84-613

Office-Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS,

No. 84-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EMI LIMITED
Petitioner,

VS.

WILLIAM BENNETT, and ERNEST J. DRONENBURG, JR., SUCCESSOR: KENNETH CORY; RICHARD SILBERMAN, and MARY ANN GRAVES, SUCCESSOR; and MARTIN HUFF and GERALD H. GOLDBERG, SUCCESSOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VALENTINE BROOKES
Counsel of Record
LAWRENCE V. BROOKES
BROOKES AND BROOKES
601 California St., #1902
San Francisco, CA 94108
(415) 981-7630
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1.a. Whether a parent United Kingdom corporation which has no permanent establishment in the United States, which has no access to the State courts, and which owns an American subsidiary, has standing to sue in the Federal courts for the following relief:

(1) To restrain defendant state tax officials from making further demands on that corporation either directly or through pressure on its American subsidiary, for financial information about its operations in other countries which it cannot provide either because the law of the home country prohibits it or because local records of foreign subsidiaries do not segregate it and make it available to the parent; and

(2) To restrain defendant state tax officials from collecting a tax assessed against the American subsidiary based on the disregard of the parent's separate entity, and on the apportionment of its income to California, all contrary to a treaty, to international law, and to the United States Constitution.

b. Whether the Federal courts can refuse to entertain a case or controversy under International Law and under the Due Process Clauses of the Fifth and Fourteenth Amendments where the State courts provide no remedy and the rights sought to be enforced are created by the United States Constitution, a treaty to which the United States is a party, and International Law.

2. Does international custom recognized and observed by the Federal Government in its own tax system bind the States of the Union or only the Federal Government, in the taxation of nationals of another country?

3. May the State of California burden foreign commerce by extending its combined unitary income formula (hereinafter "combined formula") to a United Kingdom corporation which has foreign commerce with the United States but which does no business in any state of the United States, which does not have a permanent establishment in the United States, which is not subject to taxation by the United States Government under either the Internal Revenue Code or the United States-United Kingdom Income Tax Convention, and where the effect of the State's application of its formula is to apportion income of the non-resident United Kingdom corporation and its non-United States subsidiaries to the American subsidiary for taxation by California where:

a. The entire income of the United Kingdom corporation and of its non-U.S. subsidiaries has already been taxed in full by the United Kingdom and the other host countries, and California allows neither a deduction for those taxes nor a credit for them against its own tax, thus producing multiple taxation of income earned in foreign commerce; and

b. The income of the American subsidiary is swollen by that apportionment far beyond any conceivable earning capacity of its own business; and

c. The apportionment of the combined net income by the three-factor formula of the ratio of California property, payroll and sales to the combined worldwide property, payroll and sales of the United Kingdom parent and its non-U.S. subsidiaries, is made on the basis of estimates, first because the Official Secrets Act of the United Kingdom prohibits the United Kingdom

corporations from revealing some of the information essential to the application of the California formula, and second because the wages paid by the non-U.K. subsidiaries are not reported to the United Kingdom parent and are for years before California made its demand for information and cannot now be assembled; and

d. There is no uniformity between the economic environment in which the American subsidiary operates and those in which the non-U.S. corporations operate, most notably because the wage rates in the United States for the years before the Court were higher than those prevailing in any other country in which the corporations which California would consolidate operate, with the result that *each* factor in the formula is weighted to apportion more net income to California than could be earned in that state by the business conducted in it, such additional income therefore being that properly taxable exclusively by the United Kingdom and the other foreign countries where the businesses are conducted; and

4. Is the Due Process Clause of the Fourteenth Amendment violated by a state tax:

a. Where the businesses of the United Kingdom parent, its non-U.S. subsidiaries, and the American subsidiary which are being combined are not unitary because their businesses consist primarily of making records and tapes in each country of music popular in that country, and the sale of those records and tapes to the residents of that country, but sales of records in

foreign commerce are made by both the U.K. parent and the American subsidiary to customers of their choice, and under a reciprocal matrix exchange agreement both the U.K. parent and the American subsidiary make records of music initially recorded by the other; and

b. Where the effect of the California formula is to tax to the American subsidiary income earned and received exclusively abroad by other corporations from business conducted locally in other countries or in foreign commerce which income California would not have jurisdiction over directly because of the Due Process Clause, of International Law, and of the United States-United Kingdom Income Tax Convention; and

c. Where any income attributable to the parent's contribution of management to its subsidiaries is derived from the United Kingdom, which is the location of the parent's management, and not the United States or California.

5. Does the United States-United Kingdom Income Tax Convention in effect in the years 1968-1974 prohibit a state's apportioning by formula to an American subsidiary some of the income of its United Kingdom parent corporation where under the treaty the United States can neither tax any of the income of the United Kingdom parent to it nor employ a formula to apportion some of the parent's income to the subsidiary to tax?

PARTIES TO THE PROCEEDING BELOW

There is no other party to this proceeding.

Petitioner is presently a wholly owned subsidiary of Thorn-EMI PLC, a United Kingdom corporation owned predominently by residents of that country. Petitioner is not aware that Thorn-EMI PLC has any similar case pending.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties to the proceeding below	v
Jurisdiction	1
Statutes, constitutional provisions and treaties involved	1
Statement of the case	2
Reasons for granting the writ	7
Conclusion	30
Appendix	A-1

TABLE OF AUTHORITIES CITED

Cases

Page

Alcan Aluminium, Ltd. v. Franchise Tax Bd., 558 F.Supp. 624 (S.D.N.Y. 1983), aff'd mem. 2d Cir., cert. den. ..... U.S. ....., 79 L.Ed.2d 170 8

Alcan Aluminium Ltd. v. Oregon Tax Comm., 724 F.2d 1294 (7th Cir. 1984) 7, 8

Arlington Heights v. Metro Housing Corp., 429 U.S. 252 (1977) 13

Baker v. Carr, 369 U.S. 186 (1962) 12

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1974) 24

Barlow v. Collins, 397 U.S. 159 (1970) 13

Barrows v. Jackson, 346 U.S. 249 (1953) 10, 11, 14

Boston Stock Exchange v. State Tax Comm., 429 U.S. 318 (1977) 12

Bryant v. Yellen, 447 U.S. 352 (1980) 11, 13

Container Corporation of Amerio v. Franchise Tax Board, ... U.S. ....., 77 L.Ed.2d 545 (1983) 16, 18, 21, 25, 26

Data Processing Serv. v. Camp, 397 U.S. 150 (1970) 13

Doctors' Hospital v. Santa Clara, 150 Cal.App.2d 53, 309 P.2d 501 (1957) 17

Duke Power Co. v. Carolina Env. Study Grp., 438 U.S. 59 (1978) 11, 12

F. W. Woolworth Co. v. Taxation & Rev. Dept., 458 U.S. 354 (1982) 18

Heald v. Dist. of Col., 259 U.S. 114 (1922) 10

Table of Authorities Cited

Cases

Page

In Re Estate of Stanford, 125 Cal. 112, 54 Pac. 259, 58 Pac. 462 (1893) 17, 26

Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 16, 18, 24, 26, 27

Maximov v. United States, 373 U.S. 49 (1963) 19, 25

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 24, 26

Montana v. United States, 440 U.S. 147 (1979) 15

Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) 8, 13, 14, 19

Sears v. The Scotia, 14 Wall. (81 U.S.) 170 (1872) 23, 24

Shell Petroleum, N.V. v. Graves, 709 F.2d 593 (9th Cir.) cert. den. ..... U.S. ....., 78 L.Ed.2d 717 8

Sumitomo Skoji America, Inc. v. Avagliano, 457 U.S. 176 (1982) 11

Texas Co. v. Los Angeles, 52 Cal.2d 55, 338 P.2d 440 (1959) 17

The Paquete Habana, 175 U.S. 677 (1900) 23, 24

United States v. Percheman, 7 Pet. (32 U.S.) 51 (1833) 22

United States v. SCRAP, 412 U.S. 669 (1973) 12, 13

United States Steel Corp. v. Multi-State Tax Commission, 367 F.Supp. 107 (S.D. N.Y. 1973), aff'd. sub silentio on this point, 434 U.S. 452 9

Warth v. Seldin, 422 U.S. 490 (1975) 10

Wing Wong, et al. v. United States, 163 U.S. 288 (1896) 13

Zschernig v. Miller, 389 U.S. 429 (1968) 25

TABLE OF AUTHORITIES CITED

Constitutions

	Page
Articles of Confederation	27
United States Constitution	i, 2, 29
Commerce Clause (Art. I, Sec. 8, cl. 3)	1, 15, 16, 18
Import-Export Clause (Art. I, Sec. 10, cl. 2)	2
Article III, "Case or Controversy"	14
Article VI, Sec. 2	24
Fifth Amendment (Due Process)	i, 2, 13, 14, 15, 29
Fourteenth Amendment (Due Process)	iii, iv, 2, 7, 8
California Constitution, Article XIII, Section 25	17

Treaties

Treaty of Arbitration with Canada	28
United States-United Kingdom Income Tax Convention (1945)	ii, iv, 3, 7, 15, 19, 20, 21, 22, 30
United States-United Kingdom Income Tax Convention (1976) Article 9(4)	28

Statutes

California Revenue and Taxation Code, Sections 25120-25140	19
Uniform Division of Income for Tax Purposes Act (UDITPA)	19
United Kingdom Official Secrets Act	ii, 4, 8, 12
United States Code:	
Title 26 (Internal Revenue Code) Section 482	7
Section 1254(1)	1

Table of Authorities Cited

Statutes

	Page
Title 28, Section 1331	1
Section 1341	1, 6
Section 2101(c)	1
Section 2201	1

International Law

Statute of the International Court of Justice (chap. 14, U.N. Charter)	23
Statute of the International Court of Justice (chap. 14, Article 38(1))	24
Statute of the World Court, Sec. 36	23

Texts

Restatement of the Foreign Relations Law of the United States, Revised, Sec. 134	23
Restatement of the Foreign Relations Law of the United States, Second, Sec. 1, Comment C	23
Restatement of the Foreign Relations Law of the United States (Draft Revision), Sec. 711, Comment a	14
Sec. 713, Comment a	14

No. 84-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EMI LIMITED
Petitioner,

VS.

WILLIAM BENNETT, and ERNEST J. DRONENBURG, JR., SUCCESSOR: KENNETH COBY; RICHARD SILBERMAN, and MARY ANN GRAVES, SUCCESSOR; and MARTIN HUFF and GERALD H. GOLDBERG, SUCCESSOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

The jurisdiction of this Court is invoked under Sections 1254(1) and 2101(c) of Title 28, United States Code. The United States Court of Appeals filed its decision on July 23, 1984. Its opinion is reported in 738 F.2d 994 and is reproduced in Appendix A hereto. The decision of the District Court, Northern District of California, dismissing the case, was entered on October 8, 1982, and is reported in 560 F.Supp. 134, and Notice of Appeal was filed by petitioner on October 21, 1982.

The jurisdiction of the federal court was invoked under Sections 1331 and 2201, Title 28, United States Code. Plaintiff has no judicial remedies available to it in the California courts under California statutes and constitution, and for that reason the Court of Appeals held that the provisions of Section 1341, Title 28, United States Code, do not remove this case from the jurisdiction of the federal courts, and remanded it to the District Court. That decision is reported in 681 F.2d 1107, 1118. Respondent did not petition for certiorari and the first decision has become the law of the case. The District Court again dismissed based on the assertions that petitioner lacks standing to sue, and the federal courts lack jurisdiction of the subject matter. The affirmance was on the first ground.

STATUTES, CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

1. The sections of the Judicial Code involved are Sections 1331 and 2201, Title 28, United States Code. They are set forth verbatim in Appendix B.

2. The sections of the United States Constitution involved are the Commerce Clause (Art. I, Sec. 8, cl. 3), the

Due Process Clause (amendment 14, Sec. 1), the Import-Export Clause (Art. I, Sec. 10, cl. 2), and Amendment V. All are set forth in Appendix C.

3. The United States-United Kingdom Income Tax Convention in effect in the years involved in this case. The text of the relevant provisions is set forth in full in Appendix D.

STATEMENT OF THE CASE

This case is one to restrain defendant California State tax officials from repeatedly demanding information from petitioner or its American subsidiary, Capitol Industries-EMI, Inc., which either petitioner does not have or cannot reveal under the laws of the United Kingdom, and from collecting a tax assessed against petitioner's subsidiary, Capitol Industries-EMI, Inc., on a portion of petitioner's income as determined by them by estimates in the absence of the information. That income is from petitioner's business done exclusively in foreign and local commerce from and in the United Kingdom, and from its subsidiaries' business in Europe, Asia and elsewhere. All this is in violation of International Law, a federal treaty, and the United States Constitution.

Petitioner, EMI Limited, is a corporation formed in the United Kingdom, which owns all or substantially all of the stock of 63 subsidiary corporations, some of which are formed under the laws of the United Kingdom, and others of which are formed under the laws of the various countries in which they operate. They operate in and are formed under the laws of more than 30 countries in Western Europe, North America, the Near East and the Far East of Asia, South America, South Africa, and Australia. Capitol

Industries-EMI, Inc., is one such subsidiary, and has been since petitioner acquired a majority of its stock in 1956. Capitol Industries-EMI, Inc. (hereinafter "Capitol") is formed under the laws of the United States, has its principal office and plant in Hollywood, California, and has other plants in Illinois, Virginia and Connecticut.

Petitioner does not do business in the United States and does not have a permanent establishment in this country. By treaty it is exempt from United States income tax. In its corporate self it does no business outside of the United Kingdom. Petitioner's worldwide subsidiaries make approximately 20% of all of the phonograph records made in the Western world, and own pressing plants located in 13 countries. Three of these plants are in the United States, owned by Capitol. In addition to that type of music business, through subsidiaries operating in several countries but not in the United States, the EMI group of corporations is in the business of retailing phonograph records and pre-recorded tapes, and sheet music.

Subsidiaries of petitioner also operate a variety of other businesses: the manufacture of television cameras, antennae and transmission equipment, and of security devices; the operation of a movie studio at which both television films and films for the theater are made; the operation of movie theaters, bingo parlors, hotels, restaurants, and places of amusement; the manufacture for the government of the United Kingdom and certain governments of NATO of military equipment, much of which employs radar principles pioneered and in some instances invented by petitioner, and the development and production of equipment in the field of medical electronics, the most notable of which

is the invention and patenting of the CAT brain scanner and body scanner. Capitol conducts no business other than the making of phonograph records and pre-recorded tapes, and at times the manufacture and sale of raw tapes for use by other recording companies.

Petitioner operates in foreign commerce between the United Kingdom and the United States. Its subsidiaries sell completed phonograph records to a United States outlet, but not to Capitol. It and its subsidiaries have a matrix exchange agreement with Capitol, modeled closely after one which petitioner had with RCA before petitioner acquired controlling interest in Capitol, under which each party has an option to license a duplicate matrix of recordings made by the other, to make recordings of the music embedded on that matrix and to sell them in their marketing areas. This agreement is entirely reciprocal, giving petitioner precisely the same rights in respect of matrices of music recorded by Capitol as it gives Capitol for matrices made by petitioner. The agreement confers an option right on each party, and does not bind either party to take any of the matrix offerings of the other. The license fees and other amounts paid for the privilege are entirely reciprocal, so that the amounts paid by Capitol to petitioner are the same as the amounts paid by EMI to Capitol, per unit manufactured.

Defendants demanded information of petitioner, threatening it with monetary penalties if it did not reply. Petitioner informed them that it was not within the jurisdiction of California, could not supply some of the information sought because of restrictions of the Official Secrets Act of the United Kingdom, and did not possess other of the

information sought because it was not supplied to petitioner by its non-U.K. subsidiaries. Defendants then made the same request for information of Capitol, with the same threat of penalty, and Capitol informed defendants that it could not supply information about petitioner which it could not get from petitioner. Defendants' staff then compiled figures about petitioner available from public sources in the United States, and assessed a proposed additional tax against Capitol based upon what they believed to be the total net income of petitioner and all of its worldwide subsidiaries, and an apportionment of it to California based upon the ratio which the California property, payroll and sales of Capitol bore to what defendants estimated was the total worldwide property, payroll and sales of petitioner and its subsidiaries. The non-U.K., non-U.S. property and payroll figures were unknown and defendants substituted their estimates. Capitol protested this action, conferences were held by Capitol representatives with defendants and their representatives, and those representatives informed Capitol that defendants would adhere to their position, until such time as Capitol provided the information defendants had sought from petitioner. Petitioner and Capitol both then filed suits in the United States District Court for the Northern District of California against the defendants, to restrain such an assessment against Capitol, and in petitioner's case to restrain defendants from demanding of petitioner, either directly or through Capitol, information it was prohibited by British law from revealing, from lessening the value of property in the United States through the assertion of unconstitutional taxes from Capitol, and from burdening petitioner's foreign commerce with the United States.

Cross-motions for summary judgment were filed, in petitioner's motion supported by extensive affidavits of officers of petitioner and Capitol, and documentary exhibits. While these cases were pending in the United States District Court, defendants' representatives proposed to Capitol's representatives that defendants would change the basis of assessment, to combine Capitol only with petitioner's music business. Capitol's representatives informed defendants' representatives that the information they needed for such a modified combination and apportionment was not available under British law, so the representatives of defendants devised figures based upon assumptions and estimates and employed those in the apportionment formula in substitution for the figures that they had previously used which had represented the entire worldwide business of petitioner and its subsidiaries. The effect was to reduce the deficiency, but a substantial deficiency in excess of $800,000 still remains in issue for the years as determined by defendants, and an unknown but certain amount for later years. A final assessment was made by defendants on that basis. Petitioner has appealed the assessment to the State Board of Equalization, which has taken no action on it. A levy on the assessment cannot be made while that appeal is pending, and it has not been paid.

The District Court rendered summary judgment for defendants, holding that for purposes of Section 1341, petitioner, although not having any judicial remedy in the California courts, must be deemed to have the remedy California law afforded to Capitol. Appeal was taken, and the Court of Appeals held that petitioner had no remedy in the California courts and therefore Section 1341 did not bar it from the federal courts but suggested sua sponte

that on remand the district court examine petitioner's standing to sue. (681 F.2d 1107, 1118) On remand the District Court refused to rule on the merits and again dismissed the case, this time on the grounds that petitioner lacked standing to sue, and that the federal courts lacked jurisdiction of the subject matter, 560 F.Supp. 134. This appeal followed, and the Court of Appeals affirmed the dismissal for lack of standing to sue.

Petitioner contends that it has standing to sue, and that taxing Capitol on an apportioned amount of petitioner's income represents a forbidden burden on foreign commerce and a denial of Due Process, contrary to the Constitution of the United States, to International Law, and to the United States-United Kingdom Income Tax Convention.

Petitioner contends that it is not engaged in a single unitary business with Capitol, and that the income of each can be readily ascertained by the arm's length method used by the United States Government under Section 482 of the Internal Revenue Code, and by all foreign governments.

REASONS FOR GRANTING THE WRIT

1. The decision below announces a novel limitation on standing to sue which is both a denial of due process and contrary to decisions of this Court. It appears also to be contrary to *Alcan Aluminium Ltd. v. Oregon Tax Comm.*, 724 F.2d 1294, 1299 (7th Cir. 1984).

(a) The Court of Appeals has denied an alien parent corporation access to the Federal courts to assert Federal rights, while acknowledging that the corporation has no access to the state courts. It has thus denied all process of

law to such a corporation.[1] This Court should grant the writ to settle whether the Fifth Amendment requires recognition of the standing of a friendly alien corporation without a state court remedy to enforce its federal rights in the federal courts, particularly in the light of this Court's decision in *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). The decision below is contrary to that decision, and the aberration is on an important issue.

(b) The threatened injuries petitioner seeks to prevent[2] are twofold. First; The considerable expense and the serious risk of violating the British Official Secrets Act which would result from its acceding to defendants' demands. These demands are that it supply the dollar equivalent of the property, payroll and sales and of the California version of net income of its 28 British and 35 off-shore subsidiaries, which in the case of the latter it does not possess and most of them do not either, and that it supply defendants with property and payroll figures for British factories which are engaged in both defense and music work and are "assessed" by the British Ministry with secrecy requirements under the Official Secrets Act. Second; The loss in the value of its American property defendants' as-

---

[1]This case is ripe, and the appellate court recognized the fact. (Op. footnote 1.) Defendants have made a final assessment, unlike the facts in some other cases which this Court recently refused to review. *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593 (9th Cir. 1983) *cert. den.* . . . U.S. . . . , 78 L.Ed.2d 717, and *Alcan Aluminium, Ltd. v. Franchise Tax Bd.*, 558 F.Supp. 624 (S.D.N.Y. 1983), aff'd mem. 2d Cir., *cert. den.* . . . U.S. . . . , 79 L.Ed.2d 170. *Alcan Aluminium Ltd. v. Ore. Tax. Comm.*, 724 F.2d 1294, 1299 (7th Cir. 1984) decided that case was unripe, but indicated the parent would have standing to sue when that condition was corrected.

[2]This is a suit for an injunction and declaratory relief.

sessment will produce because it will tax petitioner's subsidiary on some of petitioner's income, which the subsidiary does not own and which does not augment its assets; defendants have estimated the California proportion of the "unitary" income because petitioner has not supplied defendants through Capitol with the information involved in the first injury, and have made an assessment based on those estimates.

The first type of injury confers standing to sue. *United States Steel Corp. v. Multi-State Tax Commission,* 367 F.Supp. 107 (S.D. N.Y. 1973), *aff'd. sub silentio on this point,* 434 U.S. 452. The appellate court chose to turn a blind eye to the continuing nature of the injury and dismissed it because the recent demands had been made against Capitol. Everyone involved knows that Capitol does not possess the information and must obtain it from petitioner, so defendants' demand is in reality that petitioner supply it, on pain of having the value of its American investment reduced. To obtain it petitioner must incur large expense, if obtaining it proves possible, and risk violation of British law petitioner is specifically "assessed" with observing. The appellate court characterized petitioner's refusal as "recalcitrance" (Op. p. 6) which is a remarkably hostile characterization of a refusal to violate British law. It is petitioner's own very real financial and legal injuries it seeks to prevent by its suit. The writ should be granted to permit this Court to remove what evidently is uncertainty that these are hazards which a party has standing to prevent.

(2) The threatened loss of value of petitioner's investment was dismissed below on the ground that a majority

shareholder has no standing to sue to prevent an injury to its controlled corporation. In this, the Court of Appeals has applied a doctrine which appears to be supported principally by its own prior decisions in turn derived from California Supreme Court decisions, in a manner which (a) denies all recourse to American courts by an alien parent corporation seeking to protect itself against financial injury and against demands that it violate the laws of its home country, (b) conflicts with decisions of this Court, (c) cynically insists on a rigid adherence to the corporate entity against petitioner when the burden of petitioner's case is that the defendant state officials are unlawfully disregarding petitioner's corporate entity, and (d) creates a class of economic loss without a remedy. The court tried to turn this argument around and use it against petitioner (Op. p. 8), but no words can obscure the fact that defendants are disregarding petitioner's corporate entity by treating Capitol as the owner of petitioner's income and assets and petitioner's suit is to force them to cease and to recognize that it is petitioner which owns them.

In addition to relying on its own prior decisions, the appellate court cited *Warth v. Seldin*, 422 U.S. 490 (1975) for the proposition that a litigant has no standing to sue to enforce the rights of third parties. The proposition is not novel and has been applied for years (viz. *Heald v. Dist. of Col.*, 259 U.S. 114 (1922)), but neither is it either inflexible or unvarying. In *Barrows v. Jackson*, 346 U.S. 249, 255-257 (1953) it was discussed at length and was called a rule of practice, not a constitutional limitation, and hence an exception to it was made to prevent "a denial of constitutional rights (because) it would be difficult if not impossible for the persons whose rights are asserted to

present their grievance before any court." (346 U.S. at 257.) That is the situation here, if the case is viewed as the court below viewed it, as one in which the legal rights petitioner is asserting are those of its subsidiary. We are uncertain whether the American subsidiary can assert rights against a state tax under either international law (custom) or the U.S.—U.K. treaty. Cf. *Sumitomo Skoji America, Inc. v. Avagliano,* 457 U.S. 176 (1982). Petitioner can do so, however, and there should be no question about its having standing to be a party.

Petitioner is asserting its own rights, which defendants are violating by using its subsidiary as an instrument of execution and force to obtain by indirection what they cannot obtain directly, viz., access to petitioner's records and income.

Moreover, the decision below ignores the fact that corporate stock is property, and this Court has held that neighboring landowners have standing to sue to prevent a consequential loss of value of their property (*Duke Power Co. v. Carolina Env. Study Grp.,* 438 U.S. 59, 73-81 (1978)); and a party even has standing to sue to enjoin the irrigation of land in which he has no present interest but which he hopes to be able to buy if the land becomes cheaper because water is cut off (*Bryant v. Yellen,* 447 U.S. 352 (1980)). The Court of Appeals seems to believe corporate stock is not property, but there cannot be a distinction between the standing of the owner of intangible property and that of a landowner to sue to protect the value of his property.

It is not even necessary to have a present or contingent property right in land in order to have standing to sue to prevent its being made unsuitable for hiking, camping and

fishing. *Duke Power Co. v. Carolina Env. Study Gp., supra,* 438 U.S. 59, 73-74 (1978); *United States v. SCRAP,* 412 U.S. 669, 685, 688 (1973).

Indeed, an economic stake not amounting to a property right can confer standing to sue on a stock exchange, both for its own injuries and those of its members. (*Boston Stock Exchange v. State Tax Comm.,* 429 U.S. 318, 320, n. 3 (1977)). Petitioner has an economic stake in not being put to the expense of formulating information not obtainable from its foreign subsidiaries, and in not being put to the hazard of fines and other penalties for violation of the Official Secrets Act.

Petitioner has a further economic stake in preventing the value of its Capitol stock being reduced through the taxation of Capitol on income it does not have, and the consequent reduction of its assets.[3] The writ should be granted so this court may remove the uncertainty which apparently exists that economic stakes such as these confer standing to sue.

(b) The appellate court held, contrary to numerous decisions of this Court, that petitioner had no standing to sue because the court thought some of its arguments on

[3]The tests of standing to sue are whether the party can obtain relief from the defendant sufficient to redress or prevent the wrong, and whether the complaining party has sufficient stake in the outcome to assure that the court will have the benefit of the party's full dedication to developing the facts and law. *Baker v. Carr,* 369 U.S. 186 (1962); *Duke Power Co. v. Carolina Env. S. Grp.,* supra. There can be no serious question about the former, and any question about the latter should be dissolved by petitioner's assiduous pressing of its cause through two previous petitions for certiorari, four briefs in the Court of Appeals, an equal number in the District Court and two or more oral arguments in each of these courts.

the merits were unsound. In *Bryant v. Yellen, supra,* 447 U.S. 352 (1980), *Arlington Heights v. Metro Housing Corp.,* 429 U.S. 252 (1977), and *United States v. SCRAP, supra,* 412 U.S. 669 (1973), this Court held that parties had standing to sue in order to obtain relief the Court then denied on the merits. Earlier the Court had held explicitly that standing to sue did not require that the cause have merit. *Data Processing Serv. v. Camp,* 397 U.S. 150, 153, n. 5 (1970); *Barlow v. Collins,* 397 U.S. 159 (1970).

The writ should be granted to make it clear, as it apparently is not to this Court of Appeals, that standing to sue is not dependent on the merit of the cause to be decided, and the standing required to sue to preserve the value of personal property and that of real property are the same.

(c) The appellate court coalesced right to sue and right to prevail into a single consideration in order to avoid applying *Russian Volunteer Fleet v. United States, supra,* 282 U.S. 481 (1931), on which we had relied. In that case this Court, reversing the Court of Claims, held that the Due Process Clause of the Fifth Amendment conferred standing to sue on an alien corporation seeking just compensation, even though ordinarily judicial policy would have denied standing because of lack of reciprocity from the foreign government. See also *Wing Wong, et al. v. United States,* 163 U.S. 288 (1896). Those cases mean that due process requires that some forum must be open to enforce an alien's federal claims. California provides no forum open to EMI, but since the rights are claimed under a federal treaty, international law, and the due process and foreign commerce clauses and the first two sources may not confer rights on Capitol, EMI must enforce its rights itself.

The writ should be granted to make it clear that the unanimous decision in *Russian Volunteer Fleet,* supra, 282 U.S. 481, still correctly interprets the Due Process Clause of the Fifth Amendment. Since the first ten amendments all modify the three basic articles, the "case or controversy" provision in Article III, if in conflict, must give way.

Rejection of a parent corporation's right to sue because to grant it standing would disregard the corporate entity, is particularly improper in a case like this one, where the substance of the relief sought is to restrain defendants from disregarding that very corporate entity. There can be no doubt that the parent corporation presents a case or controversy so the decision below must be on policy grounds (*Barrows v. Jackson, supra,* 346 U.S. 249, 255-257 (1953)). We submit that there can be no valid policy which strangles the federal courts so that they cannot hear a parent corporation's complaint that its corporate entity is being ignored to its damage.

(d) International law obligates the United States to provide a forum for the protection and enforcement of treaty rights and other rights which international law recognizes. See Restatement of the Foreign Relations Law of the United States (Draft Revision), Sec. 711, comment a; Sec. 713, comment a. The Court of Appeals disposed of this point by stating that petitioner had no such rights to enforce. Again the court confused standing to sue and standing to win, contrary to clear, contrary decisions of this Court, which apparently need restating.

For the foregoing reasons, the writ should be granted.

2. The merits of petitioner's case are based on (1) the international custom consistently applied both in bi-lateral treaties and independently of them that a foreign corporation not doing business in a taxing country is not taxable by that country on any of its income, (2) the international custom observed by both treaty and non-treaty countries of calculating the taxable income of a taxable subsidiary by the arm's length method and not by an apportionment formula, (3) the Foreign Commerce Clause, (4) Due Process Clause, and (5) the United States-United Kingdom Income Tax Convention in effect between 1946 and 1976. Two of these grounds can be relied on by Capitol in the California courts, but it is uncertain whether it can rely on three of them because neither international law nor custom ordinarily limit a nation's taxation of its own nationals, and as a general proposition perhaps not applicable under this treaty the same is ordinarily true of bi-lateral treaties.

Because the briefs below were on the issue of standing to sue and the propriety of the dismissal of the complaint on that ground, the merits of the case were not briefed, the treaty argument was explained but not argued and the Commerce Clause, Due Process Clause and international custom contentions were named but not explained. Yet the Court of Appeals has prejudged the merits of both the treaty and international custom argument, and its decision, if allowed to stand, may be conclusive on those issues not only against petitioner but against Capitol. See *Montana v. United States,* 440 U.S. 147, 163-164, notes 10, 11 (1979). Apparently the court thought, contrary to this Court's decisions discussed above, that only those entitled to win are entitled to sue. Since the Court of Appeals decided two of the contentions on the merits, the merits are also presented.

The Court may wish to grant certiorari for the purpose of deciding the merits, for the following reasons:

(a) In *Container Corporation of America v. Franchise Tax Board*, ... U.S. ....., 77 L.Ed.2d 545 (1983), this Court expressly left open the constitutionality under the Commerce Clause and the "single voice" doctrine of applying the combined unitary formula to a domestic subsidiary and a foreign based parent. See 77 L.Ed.2d at pp. 568, 569, 571, 572 and 573. The Foreign Commerce Clause restriction on taxation enunciated in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), was held inapplicable to domestically owned multinational business groups, but the Court deferred consideration of its effect on a foreign based multinational group until a case involving such a group should be presented.

The question in *Container* was whether the subsidiaries were part of the parent's unitary business. Here the question is in direct reverse; it is whether the business of EMI Limited and that of its non-United States subsidiaries are part of Capitol's unitary business. Capitol does not control them and cannot direct them. It does not receive the benefit of their profits. The question why it should be taxed on any of their profits is entirely different from the *Container* issue and is one expressly left unanswered in that case. This is the case in which the Court may answer it.

(b) The preserved issue is important and needs to be resolved by this Court. Even if the efforts of the Working Group as reported by Secretary Regan to President Reagan should eventually produce consensus state legislation adopting the "water's edge" limitation, (which at this time is

highly conjectural),[4] the problem will remain for judicial solution for all earlier years. Retroactive tax reductions for sixteen years are unlikely to be enacted by any state, and under Article XIII, Section 25 of the California Constitution would be invalid if enacted in California. *In Re Estate of Stanford,* 125 Cal. 112, 54 Pac. 259, 58 Pac. 462 (1893); *Texas Co. v. Los Angeles,* 52 Cal.2d 55, 66, 338 P.2d 440, 446 (1959); *Doctors' Hospital v. Santa Clara,* 150 Cal.App.2d 53, 309 P.2d 501 (1957). Uncertainty over the issue would plague the state courts for years until a case from one of them could reach this Court, and review and decision by this Court in this case can resolve now the issue this Court left open.

(c) This case contains a pending motion for summary judgment on the merits filed by petitioner in the trial court and not reached by it because of the dismissal. It was renewed on the remand and not acted on because the second dismissal order was entered, for lack of standing to sue. This motion is supported by extensive affidavits with no dispute about any material fact. They present a complete record. While this Court would ordinarily not consider reviewing a case where the facts had not been initially determined below, remand to the district court is not necessary to resolve factual disputes. It would serve only a winnowing function, one which the district court on two proceedings before it has refused to accept, producing much delay in the resolution of the real issues, all of which are federal issues susceptible of ultimate resolution only by this Court, and needing early resolution in the interest of international amity.

---

[4]Two bills to do so, one supported by Governor Deukmejian, died when the California Legislature adjourned.

(d) The preserved issue is a Commerce Clause issue. There is also a Due Process (Fourteenth Amendment) issue. In both *F. W. Woolworth Co. v. Taxation & Rev. Dept.*, 458 U.S. 354 (1982), and the *Container* case this Court expressed its belief in the ability of top management to be a source of income. In *Woolworth* the abstention of American top management from control over the operations of the British subsidiary led this Court to conclude that none of the subsidiary's net income was attributable to American management and hence the Due Process Clause was violated by treating the British subsidiary and the American parent as unitary. In *Container,* however, this Court found evidence that the management of the American parent did contribute to the success of the foreign subsidiaries and upheld the apportionment of some of their net income to the American parent on that account. Here, though, the management of the parent is in the United Kingdom. If its guidance and supervision produce some of Capitol's income, the source is activities in the United Kingdom. Obviously, income earned in the United Kingdom does not have its source in California, and there is no territorial jurisdiction (Due Process) to support the tax, whether against EMI or Capitol.

(e) The double taxation foreseen in *Japan Line* is present here. The United Kingdom and every host country of the subsidiaries impose an income tax. So does California. Unlike *Container Corp.*, no credit or deduction has been allowed for the foreign tax. California allows neither, as a matter of policy. The United States allows no credit for the foreign taxes because due to its concept of foreign policy it imposes no tax on the incomes of the foreign cor-

porations. Thus there is double taxation without amelioration.

(f) The treaty right petitioner has sued to enforce (see *Russian Volunteer Fleet v. United States,* supra), arises under Article I(2) of the United States-United Kingdom Income Tax Convention of April 16, 1945, which was in effect in these years.[5] That provision states:[6]

> "(2) The present Convention shall also apply to any other *taxes of a substantially similar character imposed by either Contracting Party subsequent to the date of signature of the present Convention* or by the government of any territory to which the present Convention is extended under Article XXI." (Emphasis ours.)

This California tax was imposed by the 1966 amendments which adopted UDITPA (Uniform Division of Income Tax Purposes Act; Rev. and Tax. Code Sections 25120-25140), "subsequent to" the signature of the treaty.

The Court of Appeals thought the term "Contracting Party" did not mean all 51 American governments collectively but only one of them. It is in error.

The term "Contracting Party" is not defined in the treaty. The treaty uses it, however, to include each State of The United States, so any new state tax would be governed by treaty restrictions. Throughout the treaty, where corporations are dealt with, the terms "United States corporation" and "corporation of one Contracting Party" are defined and used to include corporations created by the laws of a

---

[5]Other provisions of this treaty were before this Court in *Maximov v. United States,* 373 U.S. 49 (1963).

[6]The relevant text of the treaty is in Appendix D.

state. Article II speaks of such laws as "laws of the United States," and of "one Contracting Party."

The texts of these definitions are:

Article II .....

> "(d) The term 'United States corporation' means a corporation, association or other like entity created or organized in or under the laws of the United States.
>
> • • •
>
> "(f) The terms 'corporation of one Contracting Party' and 'corporation of the other Contracting Party' means a United States corporation or a United Kingdom corporation as the context requires.
>
> • • •

Since nearly all American commercial and manufacturing corporations are formed under state law, the treaty clearly regards such corporations as "organized under the laws of the United States," and as "corporation(s) of one Contracting Party."

Article III of the treaty (Appendix D, *infra*) requires the use of the arm's length method and does not permit the use of a formula in allocating income to source. It also provides that neither Contracting Party shall tax a corporation of the other Contracting Party if the corporation does not have a "permanent establishment" within the taxing Party, and then provides:

> "the fact that a corporation of one Contracting Party (here Petitioner) has a subsidiary corporation which is a corporation of the other Contracting Party (here Capitol) • • • • shall not of itself constitute that subsidiary corporation a permanent establishment of its parent corporation."

Since Capitol, formed under the laws of California, is a "corporation of one Contracting Party", the treaty regards the laws of a state as the laws of a Contracting Party.

That meaning is necessary to impart any significance to Article XXI of the Treaty, which, as the Court of Appeals acknowledged, forbids state as well as federal taxation which discriminates against an American subsidiary of a British parent. (Op. footnote 3.) What the Court of Appeals did not observe is that unless Capitol is a "corporation of one of the Contracting Parties" the discrimination prohibited by subsection (3) could be practiced against it by a state with impunity, and the same would be true of a Delaware, Nevada, New Jersey or Illinois corporation. Only if such corporations are "corporation(s) of one of the Contracting Parties" is a discriminatory state tax prohibited. Necessarily state incorporated corporations are meant to be "corporations of one of the Contracting Parties." As we have shown above, Article II defines that term to mean a "United States corporation", and also defines that term to be "a corporation . . . created or organized in or under the laws of the United States."

The enclosing circle of logic showing that state laws are "laws of the United States" and a state corporation is a "corporation of one Contracting Party" is complete. It follows that a new tax "imposed by either Contracting Party" includes a new state tax.

We are aware of this Court's dictum in *Container Corp. v. Franchise Tax Board,* ..... U.S. ....., 77 L.Ed.2d at 573, *supra,* that "none of the tax treaties into which the United States has entered covers the taxing activities of . . . States." As we have shown that dictum cannot encompass the U.S.-

U.K. treaty, Article XII(5) of which is specific that it does cover the taxing activities of States. The Court also referred on the same page to the action of a minority of the Senate in blocking an even more explicit prohibition in the successor treaty.

The membership of the Senate was different in 1945 than it was in 1978. It is different today from what it was in 1978. Several senators in the disapproving minority are no longer in the Senate. Many senators voted against the treaty even when the state tax restriction was removed, thereby showing that was not what they had objected to. It is thus treacherous to gauge the sense of the Senate in 1945 from what transpired in 1978.

The current treaty is much more clearly drafted. The 1945 treaty requires close analysis for American eyes, but for British eyes unaccustomed to viewing matters from a federal perspective, the suggestion that the treaty should be read as binding only one of the 51 governments comprising the United States of America[7] must have come as quite a shock. Undoubtedly it stimulated them to insist on a more clearly stated restriction than had seemed necessary before some states began applying the unitary formula to include foreign parent corporations.

A bi-lateral treaty is a contract between two nations (called States in international practice), and intended to be clear to both. This sometimes is not the case, as is shown by *United States v. Percheman*, 7 Pet. (32 U.S.) 51, 87 (1833), where this Court overruled an earlier decision of its own after reading an accredited translation of the Span-

---

[7]The preamble to the Constitution states that that is the name of the nation it formed.

ish language version of the Florida Cession Treaty. The Court concluded that reading the English language version alone distorted the intended meaning.

(g) Petitioner, a friendly alien corporation, also contends that under international custom so widely accepted that it has become international law, its income cannot be taxed either to it or to its subsidiary, by the State of California, and that State must conform to the arm's length method in determining the subsidiary's income.

(1.) Internationally accepted custom is one source of international law. Sec. 38(1), Statute of the International Court of Justice (Chap. 14, United Nations Charter); Sec. 36, Statute of the World Court; *Sears v. The Scotia,* 14 Wall. (81 U.S.) 170 (1872); *The Paquete Habana,* 175 U.S. 677 (1900); Restatement of the Foreign Relations Law of the United States, Second, Sec. 1, Comment C. As international law, it is equal in authority to law made by international agreement. Restatement (Revised) Sec. 134, Comment D. Every one of the 33 treaties on the subject in force, every one negotiated and awaiting ratification, and every model treaty both of this Government and of the United Nations and of other international agencies, provides for use of the arms length method of allocating income to source, not a formula. International practice is to use it between countries without bi-lateral tax treaties.

In *Sears v. The Scotia,* supra, 14 Wall. (81 U.S.) 170 (1872), in the absence of treaties, this Court found that thirty countries had unilaterally adopted regulations giving sailing vessels the right of way over steamships, and held that they established international custom which was international law. Here the international custom is established by thirty-three bilateral treaties, general acceptance

of the same rule by non-treaty nations, and by model treaties of the United Nations. There is then an even broader base for finding the existence of an international custom than there was in *The Scotia*. That case was followed in *The Paquete Habana*, 175 U.S. 677 (1900).

Moreover, the United Nations Charter, which is a treaty the United States has signed and ratified, declares that "international custom, as evidence of a general practice accepted as law" is "international law" the International Court of Justice is to recognize and apply. Article 38(1) of Chapter 14 (printed in Appendix E).

(2.) Since international custom which has become international law is the law of the United States governing both federal courts (*The Paquete Habana*, supra, and *Sears v. The Scotia*, supra) and federal executive agencies (*McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)), it is the Supreme Law of the land, binding the states. Art. VI, Sec. 2; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-427 (1974). We contend that the firmly established international custom whereby income of a foreign corporation not having a permanent establishment in the taxing jurisdiction is not taxable by it, even if the foreign corporation has a subsidiary there, is binding on the states, as is the inflexible refusal of international custom to permit a formula to be used to determine the taxable income of the subsidiary.

This Court has in the past been sensitive to the damage to our foreign relations which state interference can produce, and has excluded the states from acting in that area. In *Japan Line Ltd. v. County of Los Angeles, supra*, 441 U.S. 434 (1979) a property tax apportioned to tax only the

percentage of value related to the period Japanese owned containers were in the county was held an unconstitutional departure from international custom. In *Zschernig v. Miller,* 389 U.S. 429 (1968), this Court held that an Oregon probate code section requiring proof of reciprocity as a condition to inheritance by an alien was an unconstitutional intrusion into foreign affairs. It is notable that the Court reached this conclusion even though the Solicitor General filed a brief stating that the Oregon statute did not "unduly" interfere with "the United States conduct of foreign relations." 389 U.S. at 434, 443.

Moreover, international custom as embodied in the bilateral tax treaties is to avoid double taxation of income of foreign owned multinational businesses. *Maximov v. United States,* 373 U.S. 49, 54 (1963) recognized that this very treaty did so. While this Court held in *Container Corporation* that the international community cannot properly be concerned with how or how many times the United States and its political subdivisions tax the income of American owned businesses, it can rightfully be and is concerned with duplicating taxation of foreign owned income. The custom which has developed is to avoid it either by credit or abstention. California, however, would do neither, even though EMI and each of its subsidiaries has paid income tax to its home country on all its income. The United States cannot avoid its responsibility to other nations to conform to the international custom by subdividing its governmental functions between itself and political subdivisions and permitting the latter to support themselves by taxing foreign source income the paramount power has agreed not to tax. There is only one government in the United States having international recognition, and it is responsible to other

nations for the conduct of its political subdivisions, including their ways of financing their governmental functions.

This tax area is a "highly charged" area (cf. *McCulloch v. Sociedad Nacional de Marineros de Honduras,* supra, 372 U.S. 10, 21) of international relations. As the Court has been told in prior cases, the Commission of the European Economic Community has filed four separate protests against this state practice, the Government of the United Kingdom has delivered diplomatic notes to our government protesting it on at least three occasions, and protests have also been lodged by the Governments of Canada, Japan and The Netherlands. We are informed that the latter has refused to continue negotiation of a new Income Tax Convention until a prohibition of this state practice is included in it. The outcry by foreign governments protesting the possibility that this Court's decision in *Container Corp. v. Franchise Tax Board,* supra, might be applicable to parent corporations formed in their own countries has been entirely unprecedented in the realm of international taxation. The President's appointment of the Working Group defused this international controversy temporarily but the falling apart of the hoped for consensus and the failure of the California legislature to approve corrective legislation have re-ignited it. Moreover, any voluntary state amendments which the foreign outcry may produce cannot be retroactive in California, *(Estate of Stanford,* supra) and probably will not be so elsewhere. Hence the issue will remain for decision by this Court in any event, and early disposition of it, particularly if it is the disposition suggested by *Japan Line Ltd. v. County of Los Angeles,* supra, will undoubtedly speed the acceptance and implementation by the states of the solution to the foreign relations and foreign

commerce problem suggested by the Chairman of the Working Group.

The foreign retaliation foreseen in *Japan Lines* is an imminent threat. Some 200 members of the House of Commons have introduced a retaliatory bill, and the Government of the United Kingdom has put off a vote on it only until July, 1985, in order to give this country more time to solve this international dispute itself.[8] In view of the four-times repeated denunciation of the combined unitary formula by the Commission of the European Economic Community we may expect action from its other members. Japan has taken its own measures, through industrial action in boycotting California and other unitary states in the placement of new assembly plants or enlargement of existing ones, and some formerly unitary states, such as Oregon, have embraced the waters' edge principle expressly to attract foreign owned factories. Once again, as in the disastrous days of the Articles of Confederation, we see states tailoring foreign economic policy for their own, not for national, purposes. The selective foreign retaliation is carving the United States into segments, in default of an authoritative position by the "one voice."

(3.) We believe it would be helpful for the Court to view the problem presented here from the vantage of the government whose laws created and govern the petitioner, that of the United Kingdom.

The United Kingdom is a sovereign government vis-à-vis other national governments. It has *attempted* to deal with

---

[8]24 Tax Notes (No. 13), pp. 1219-1220, quoting Mr. J. D. Taylor Thompson, Commissioner and Undersecretary of Inland Revenue (United Kingdom).

the United States of America, also a sovereign national government. The executives of the two countries negotiated and signed an income tax convention, which is a treaty, in 1976 which contained in its Article 9(4) a provision specifically intended to deal with the problem confronted by the petitioner, and now this Court. The remedial provision of the treaty was removed when the United States Senate, in a vote 2 short of the two-thirds required by the Constitution (yet a majority) failed to ratify the treaty, under the assertion of some of the dissenters that the provision intruded on "states' rights".

Remedial legislation has been introduced in Congress in each of the last ten sessions. Each bill has been challenged as restricting "states' rights" and none has been enacted.

Just what is the "states' right" involved in this dispute? The states, including California, are "sovereign" only vis-à-vis one another. They are not sovereign national governments, and the conduct of foreign affairs is specifically denied them by the Constitution. If the states have any "rights" in this dispute with foreign governments, they either must be sovereign rights susceptible to negotiation by each state with every national government, including the United Kingdom, or they can only be "rights" to the extent they are *positively* asserted by the sovereign national government of the United States in the conduct of its foreign relations with the United Kingdom, e.g., Treaty of Arbitration with Canada in 1871 to settle rights to the San Juan Islands claimed by Washington.

If this Court, which is one of the three arms of the national sovereign government, refuses to address the very real, immediate, and controversial issues presented here, to

what course must the United Kingdom turn to protect the very real, immediate and actual rights of the petitioner? Should it seek to exchange ambassadors with the State of California, or perhaps the Multi-State Tax Commission, to negotiate over this matter of "states rights"? And if negotiations fail, should the United Kingdom sail its warships into San Francisco Bay as a display of naked force against an intractable government operating outside of international law?

Certainly, the problem facing the United Kingdom, seeking some forum in which the rights of its corporate creation, EMI Limited, may be addressed, is real. Two of the three branches of the national sovereign have been closed by "states' rights". Similar avenues in state governments may not be explored because of the United States Constitution. State courts are closed to the petitioner by state rules. The only governmental channel for recourse remaining is the federal courts and this Court offers the only remaining avenue open for redress of the rights of the petitioner, a United Kingdom corporation.

The writ should therefore be granted on the merits of this case, to determine (1) whether the refusal of California to heed the "single voice" doctrine in taxing the net income of a foreign owned and based multinational group is a forbidden burden on foreign commerce, (2) whether international custom that a formula cannot be used and the arm's length method must be used in determining the net income of the American subsidiary of a foreign multinational group is International Law binding on the states as the Supreme Law of the land, (3) whether under the Due Process Clause any net income attributable to the

parent's top management's supervisory role can be apportioned to an American state for taxation when that top management is located in and functions from the United Kingdom, and (4) whether the United States-United Kingdom Income Tax Convention, adopted in 1945 and in effect in the taxable years applies to limit not only federal taxes but also new state taxes first "imposed" after signature of the Convention.

CONCLUSION

The writ of certiorari should be granted on the issue of standing to sue and on the merits.

Respectfully submitted,

VALENTINE BROOKES
Attorney of Record

LAWRENCE V. BROOKES
601 California St., #1902
San Francisco, CA 94108
(415) 981-7630
Attorneys for Petitioner

San Francisco, California
October , 1984.

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 82-4611
DC No. CV 79-2146

EMI Limited,
Plaintiff-Appellant,

vs.

William Bennett, Kenneth Cory,
Mary Ann Graves, and
Gerald H. Goldberg,
Defendants-Appellees.

[Filed July 23, 1984]

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued and submitted May 15, 1984

OPINION

Before: ANDERSON, SKOPIL, and POOLE, Circuit Judges

SKOPIL, Circuit Judge:

The district court dismissed this action on the ground that EMI, Limited ("EMI") lacked standing. *EMI Ltd. v. Bennett,* 560 F.Supp. 134, 135-36 (N.D. Cal. 1982). We affirm.

FACTS AND PROCEEDINGS BELOW

Capitol Industries-EMI, Inc. ("Capitol"), is a Delaware corporation with its principal place of business in California. Capitol is in the business of recording phonograph records and tapes. Capitol's business is conducted almost exclusively in the United States.

EMI, a United Kingdom corporation, owns the majority of the stock of Capitol. EMI owns a group of subsidiaries, most of which operate outside the United Kingdom. EMI, through its subsidiaries other than Capitol, is engaged in the same business as Capitol, but primarily in markets other than in the United States. In addition, EMI and its foreign subsidiaries, other than Capitol, are engaged in businesses unrelated to the recording industry.

Capitol pays both federal and California state income taxes. Neither EMI nor its subsidiaries, other than Capitol, pay income taxes to the United States or any individual state. However, EMI and its other subsidiaries have paid taxes in their respective home countries.

The Franchise Tax Board, State of California ("FTB"), contends that California law requires a combined tax report from a taxpayer that covers all commonly owned or controlled corporations that are engaged in a "unitary" business. The FTB has determined that Capitol, EMI and other EMI subsidiaries are engaged in a single or "unitary" business to the extent of their "music activities." Therefore, the FTB proposed to assess against Capitol an additional tax liability based on the state's "unitary method" of taxation.

Application of the unitary scheme under California law involves combining the net incomes of Capitol, EMI, and all of EMI's other subsidiaries, derived from the music portion of their businesses. That combined income is then apportioned between California and the rest of the world based on a formula using the California ratio of property, payroll, and sales, to the world-wide figures for the same factors. *See* Cal. Rev. & Tax. Code §§ 25101, and 25128-36.

In the course of the FTB's investigation of Capitol, it demanded that EMI provide certain business records relating to EMI and its subsidiaries. EMI refused. EMI argued that, under the Official Secrets Act of the United Kingdom, some of the information, related to military contracts entered into by EMI and the British government, is not disclosable under the law of the United Kingdom. EMI refused to provide other information on the grounds that it either lacked access to such information, or because California lacks jurisdiction over EMI and its non-United States subsidiaries. The FTB then dropped its demands for information from EMI. It shifted its demand to Capitol, asking Capitol for the same information it had sought from EMI. Capitol claimed it did not have the requested information and that EMI would not provide it the information. The FTB's unitary assessment was therefore made on the basis of estimated figures available from various public sources.

Capitol filed an action in district court against several persons individually and as members of the FTB. Capitol sought injunctive and declaratory relief to prevent the proposed assessment. Capitol argued that unitary treatment of its business and that of EMI and other EMI subsidiaries violated California law and the Foreign Commerce Clause of the United States Constitution, Art. I, Sec. 8, Clause 3.

EMI filed a separate action in federal court against the same defendants and asserting the same claims as Capitol. Additionally, EMI alleged that the proposed assessment on its subsidiary Capitol would negatively affect its stock holdings in Capitol. Both EMI and Capitol also sought

relief from the FTB's demand that Capitol provide certain records of EMI and its foreign subsidiaries.

Cross-motions for summary judgment were filed. The district court denied Capitol's and EMI's motions and granted the Board Members' motions on the ground that the Anti-Injunction Act precluded subject matter jurisdiction because a "plain, speedy and efficient" state court remedy existed for the claims asserted by Capitol and EMI. 28 U.S.C. § 1341.

On appeal, this court held that the action by Capitol should be dismissed because Capitol had an adequate remedy under state law.[1] *Capitol Industries-EMI, Inc. v. Bennett,* 681 F.2d 1107, 1118 (9th Cir.), *cert. denied,* 455 U.S. 943 (1982). The action brought by EMI, however, was remanded for further proceedings. The administrative procedures and refund suit provided by California law are remedies available only to taxpayers. Since only Capitol, and not EMI, is a taxpayer, EMI has no method under state law to challenge tax assessments. This court held that 28 U.S.C. § 1341 was no bar, but questioned whether EMI had standing to challenge a tax assessment against its subsidiary, Capitol. *Id.* at 1119 n.3. The court chose not to rule on that issue and remanded to the district court for its consideration.

After remand the defendants moved to dismiss for lack of standing. The district court held that EMI was without

---

[1]Some time after the district court's decision, the assessment against Capitol became final. Capitol then appealed to the California State Board of Equalization. The FTB cannot take steps to enforce the collection of the assessed tax while the appeal is pending before the Board of Equalization. At the time of this writing, Capitol's administrative appeal was still pending.

standing to challenge the tax against Capitol. *EMI Ltd.*, 560 F.Supp. at 135-36. EMI appealed.

DISCUSSION

1. Standard of Review.

Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Joyner v. Mofford*, 706 F.2d 1523, 1526 (9th Cir.) (*quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975)), *cert. denied*, 104 S.Ct. 509 (1983). Because standing is a jurisdictional question, this court reviews *de novo*. *E.g.*, *Societe de Conditionnement v. Hunter Engineering*, 655 F.2d 938, 941 (9th Cir. 1981).

2. Merits.

Courts require a plaintiff to have a "personal stake" in the outcome of a case "to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Joyner*, 706 F.2d at 1526 (*quoting Warth*, 422 U.S. at 498-99) (emphasis in original). To have such a "personal stake," a plaintiff must allege a "distinct and palpable injury to himself." *Joyner*, 706 F.2d at 1526 (*quoting Warth*, 422 U.S. at 501). "[W]hen a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III [United States Constitution] limitation." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

The essence of EMI's argument is that it is injured by the tax assessed (but not yet collected) against Capitol. As EMI states it, "[t]his case is one to restrain [the FTB] from demanding of EMI [either directly or through Capitol], information it is prohibited by British law from revealing, from lessening the value of EMI's property in United States through the assertion of unconstitutional taxes from Capitol, and from burdening EMI's foreign commerce with the United States."

Despite EMI's attempts to characterize itself as a prime participant, its only real connection to the live controversy is in its status as majority shareholder of Capitol stock. The FTB is making demands for information only from Capitol. If Capitol fails to produce the information because of EMI's recalcitrance the result will be, at worst, either an increase in Capitol's tax liability or a tax penalty. Whether through the imposition on Capitol of taxes or the increase in taxes because of Capitol's failure to produce information, EMI's only possible injury is the dimunition in value of its holdings in Capitol.

Generally, a shareholder does not have standing to redress an injury to the corporation in which it holds stock. *Shell Petroleum, N.V. v. Graves,* 709 F.2d 593, 595 (9th Cir.), *cert. denied,* 104 S.Ct. 537 (1983); *Sherman v. British Leyland Motors, Ltd.,* 601 F.2d 429, 439-40 (9th Cir. 1979) (sole shareholder had no standing to assert either federal or state law claims); *Von Brimer v. Whirlpool Corp.,* 536 F.2d 838, 846 (9th Cir. 1976) (majority shareholder may not assert state law claims despite economic injury to him); *Erlich v. Glasner,* 418 F.2d 226 (9th Cir. 1969) (sole shareholder could not maintain an action under 42 U.S.C. § 1983).

> To have standing to maintain an action, a shareholder must assert more than personal economic injury resulting from a wrong to the corporation. *Von Brimer v. Whirlpool*, 536 F.2d at 846. A shareholder must be injured directly and independently of the corporation. *Id.*; *Erlich v. Glasner*, 418 F.2d at 228.

Graves, 709 F.2d at 595.

This case is controlled by *Graves*. The facts in *Graves* are nearly identical to those presented here. Shell Petroleum, a Netherlands corporation, is the majority shareholder in both Shell Oil and Scallop Holding, Inc., which in turn owns Scallop Nuclear. Both Shell Oil and Scallop Nuclear are Delaware corporations doing business in California. The FTB proposed unitary tax treatment for Shell Oil and Scallop Nuclear and their parent corporations. In the process, the FTB demanded information concerning the worldwide operations of Shell Petroleum from Shell Oil and Scallop Nuclear. Shell Petroleum contested the application of the unitary tax and the demand for information from its subsidiaries. The district court held that Shell Petroleum had no standing, and this court affirmed. *Graves*, 709 F.2d at 595-96. The court found that the unitary method of taxation did not harm Shell Petroleum directly or independently of the harm to its subsidiaries. It was therefore without standing under the general rule that shareholders are without standing to assert the rights of the corporation in which they have ownership. *Id.*

EMI attempts to distinguish *Graves* on several grounds. First, EMI argues that "the substance of [its] complaint is that it wants its corporate entity observed, and wants the corporate entity of its subsidiary, Capitol, also observed." EMI argues that a similar demand was not a part of the

complaint by Shell Petroleum. EMI's argument is without merit. While Shell Petroleum may not have said so in so many words, it is clear that it was objecting to the unitary tax which does, to an extent, blur corporate identities. EMI's argument goes to the legality of California's unitary tax method which, despite the fact it blurs corporate identities, has been recently upheld. *See Container Corp. v. Franchise Tax Board,* ..... U.S. ....., 103 S.Ct. 2933 (1983).[2]

The general rule of no standing for stockholders does observe lines of corporate identity and is, in fact, based on the concept of distinct corporate identities. In order for EMI to prevail it would have to argue that the court should observe corporate identities for purposes of its argument against the unitary tax, but ignore corporate identities for purposes of its argument against the general rule of no standing for stockholders. A decision by the court in favor of EMI would be contrary to the cases upholding the unitary tax method and also contrary to the cases establishing the general rule of no stockholder standing.

---

[2]*Container Corp v. Franchise Tax Board,* ... U.S. ... , 103 S.Ct. 2933 (1983) made clear that the blurring of corporate identities for purposes of unitary taxing was permissible. 103 S.Ct. at 2941. *See also Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 425, 440-41 (1980)(same). It is true that *Container Corp.* is distinguishable from this case in that *Container Corp.* involved a domestic parent corporation with foreign subsidiaries, while this case involves a foreign parent corporation with domestic (as well as foreign) subsidiaries. While that distinction may make a difference with respect to other questions decided in *Container Corp.*, for purposes of ignoring corporate identities, that distinction makes no difference.

Second, EMI attempts to distinguish *Graves* by arguing that here, a treaty between the United States and Great Britain gives EMI standing. In *Graves,* Shell Petroleum argued that a treaty between the United States and the Netherlands provided for standing. This court held that it did not. *Graves,* 709 F.2d at 596. EMI argues the treaty between the United States and Great Britain differs significantly from the treaty between the United States and the Netherlands. If EMI's interpretation of the treaty is correct, it might well have standing. A cause of action may be specifically granted to a shareholder distinct from the corporation by a treaty provision. *Graves,* 709 F.2d at 595; *Harmsen v. Smith,* 542 F.2d 496, 499-500 (9th Cir. 1976).

The treaty relied upon by EMI does not specifically, or even implicitly, grant special status to stockholders in respect to the corporations in which they have ownership. *See* United States-United Kingdom Income Tax Convention of 1946, 60 Stat. 1377-97 (June 26, 1946). Moreover, the treaty by its explicit terms does not even cover taxes imposed by a state:[3]

ARTICLE I

(1) The taxes which are the subject of the present Convention are:

(a) In the United States of America: The Federal income taxes, including surtaxes and excess

---

[3]The treaty does mention state taxes in Article XXI, but specifically limits the reference to state taxes for purposes of that section. Article XXI prohibits discrimination in federal, state, or municipal taxation of foreign corporations. There is no claim in this case that the FTB is applying the unitary method of taxation to foreign corporations differently than domestic ones.

profits taxes (hereinafter referred to as United States tax)

(b) In the United Kingdom of Great Britain and Northern Ireland: The income tax (including surtax), the excess profits tax and the national defense contribution (hereinafter referred to as United Kingdom tax).

(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequently to the date of signature of the present Convention or by the government of any territory to which the present Convention is extended under Article XXII.

The contracting parties to the tax treaty are the federal governments of the United States and the United Kingdom. Art. XXII referred to in Art. I, Sec. 2, does not include individual states within the meaning of "territory."

EMI makes three other arguments, none of which have merit. It argues that an alien corporation is entitled to the protection of the fifth amendment. That argument has no application in this case. The question is not whether an alien has standing, but whether a stockholder has standing to act for the corporation. EMI also argues that, under international law, "if a country confers rights on a foreign national, it is obligated to provide a judicial tribunal to enforce those rights." Again, the argument does not fit the facts of the case. This country has conferred no special rights on EMI. The nondiscriminatory application of rules of standing eliminate EMI as a plaintiff in this tax matter involving its subsidiary, Capitol.

Finally, EMI argues that unless it has standing, important questions reserved by the Supreme Court in *Container Corp.* will be rendered essentially unreviewable. *Container Corp.* was the mirror image of this case. It involved reaching foreign subsidiaries of a domestic parent corporation, whereas this case involves reaching the foreign parent of domestic subsidiaries. The Court specifically limited its decision to the factual circumstances presented. *Container Corp.*, 103 S.Ct. at 2952 n.26. EMI is plainly wrong that the questions reserved will never reach the Court unless EMI is granted standing. The factual context presented by this case could reach the Supreme Court the same way that *Container Corp.* did, by appeal through the California courts. Capitol is best suited to assert rights that are distinctly its own.

The district court is AFFIRMED.

Appendix B

Judicial Code Sections. (Title 28)

Section 1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Section 2202.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USC § 7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Appendix C

United States Constitution:

Article I, § 8, Cl. 3.

Power of Congress to regulate Commerce.

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Art I, Sec. 10, Cl 2

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Sec. 1,

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law

Appendix D

Relevant Sections, United States-United Kingdom Income Tax Convention of 1945.

Article I.

(1) The taxes which are subject of the present Convention are:

(a) In the case of the United States of America: the Federal income taxes, including surtaxes (hereinafter referred to as 'United States tax');

(b) In the case of the United Kingdom of Great Britain and Northern Ireland: The income tax (including surtax), the corporation tax, and the capital gains tax (hereinafter referred to as 'United Kingdom tax').

(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequent to the date of signature of the present Convention by the government of any territory to which the present Convention is extended under Article XXII."

Article II.

(1) In the present Convention, unless the context otherwise requires:

(a) The term "United States" means the United States of America, and when used in a geographical sense means the States, the Territories of Alaska and of Hawaii and the District of Columbia.

(b) The term "United Kingdom" means Great Britain and Northern Ireland, excluding the Channel Islands and the Isle of Man.

(c) The terms "territory of one of the Contracting Parties" and "territory of the other Contracting Party" mean the United States or the United Kingdom as the context requires.

(d) The term "United States corporation" means a corporation, association or other like entity created or organized in or under the laws of the United States.

(e) The term "United Kingdom corporation" means any kind of juridical person created under the laws of the United Kingdom.

(f) The terms "corporation of one Contracting Party" and "corporation of the other Contracting Party" mean a United States corporation or a United Kingdom corporation as the context requires.

(g) The term "resident of the United Kingdom" means any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in the United States for the purposes of United States tax. A corporation is to be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom.

(h) The term "resident of the United States" means any individual who is resident in the United States for the purpose of United States tax and not resident in the United Kingdom for the purposes of United Kingdom tax, and any United States corporation and any partnership created or organized in or under the laws of the United States, being a corporation or partnership which is not resident in the United Kingdom for the purposes of United Kingdom tax.

(i) The term "United Kingdom enterprise" means an industrial or commercial enterprise or undertaking carried on by a resident of the United Kingdom.

(j) The term "United States enterprise" means an industrial or commercial enterprise or undertaking carried on by a resident of the United States.

(k) The terms "enterprise of one of the Contracting Parties" and "enterprise of the other Contracting Party" mean a United States enterprise or a United Kingdom enterprise, as the context requires.

(l) The term "permanent establishment" when used with respect to an enterprise of one of the contracting Parties means a branch, management, factory or other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf. An enterprise of one of the Contracting Parties shall not be deemed to have a permanent establishment in the territory of the other Contracting Party merely because it carries on business dealings in the territory of such other Contracting Party through a *bona fide* commission agent, broker or custodian acting in the ordinary course of his business as such. The fact that an enterprise of one of the Contracting Parties maintains in the territory of the other Contracting Party a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute such fixed place of business a permanent establishment of such enterprise. The fact that a corporation of one

Contracting Party has a subsidiary corporation which is a corporation of the other Contracting Party or which is engaged in trade or business in the territory of such other Contracting Party (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary corporation a permanent establishment of its parent corporation.

• • •

Article III.

(1) Industrial or commercial profits of an enterprise of one of the Contracting Parties shall be exempt from tax by the other Party unless the enterprise is engaged in trade or business in the territory of such other Party through a permanent establishment situated therein. If such enterprise is so engaged, tax may be imposed by such Party on the industrial or commercial profits of the enterprise but only on so much of them as are directly or indirectly attributable to the permanent establishment.

(2) Where an enterprise of one of the Contracting Parties is engaged in trade or business in the territory of the other Contracting Party through a permanent establishment situated therein, there shall be attributed to such permanent establishment the industrial or commercial profis which it might be expected to derive if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at arm's length with the enterprise of which it is a permanent establishment.

Article XXI

(1) A national of one of the Contracting Parties who is resident in the territory of the other Contracting Party shall not be subjected in that other Contracting Party to more burdensome taxes than is a national of that other Contracting Party who is resident therein.

(2) A permanent establishment which an enterprise of one of the Contracting Parties has in the other Contracting Party shall not be subject in that other Contracting Party to more burdensome taxes than is an enterprise of that other Contracting Party carrying on the same activities. This paragraph shall not be construed as obliging either Contracting Party to grant to residents of the other Contracting Party any personal allowances or deductions which are by its law available only to residents of that former Contracting Party, nor as restricting the right of either Contracting Party to tax in accordance with paragraph (1) or paragraph (2) of Article VI dividends paid to a permanent establishment maintained within its territory by a resident of the other Contracting Party.

(3) A corporation of one of the Contracting Parties, the capital of which is wholly or partly owned by one or more nationals or corporations of the other Contracting Party, shall not be subjected in the former Contracting Party to more burdensome taxes than is a corporation of the former Contracting Party, the capital of which is wholly owned by one or more nationals or corporations of that former Contracting Party.

(4) The term "nationals" as used in this Article means

(a) in relation to the United Kingdom, all British subjects and British protected persons (being individuals), from the United Kingdom or any territory with respect to which the present Convention is applicable by reason of extension made by the United Kingdom under Article XXII; and

(b) in relation to the United States, United States citizens, and all individuals under the protection of the United States, from the United States or any territory to which the present Convention is applicable by reason of extension made by the United States under Article XXII.

(5) In this Article the word "taxes" means taxes of every kind or description, whether national, Federal, state, provincial or municipal.

Appendix E

Article 38(1), Ch. 14, Charter of The United Nations: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Office - Supreme Court, U.S.
FILED
NOV 9 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-613

In The

Supreme Court of the United States

October Term, 1984

EMI LIMITED,

Petitioner,

vs.

WILLIAM BENNETT, and ERNEST J. DRONENBURG, JR., Successor; KENNETH CORY; RICHARD SILBERMAN, and MARY ANN GRAVES, Successor; and MARTIN HUFF and GERALD H. GOLDBERG, Successor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN K. VAN DE KAMP
Attorney General

EDWARD P. HOLLINGSHEAD
Deputy Attorney General
COUNSEL OF RECORD

CHARLES C. KOBAYASHI
Deputy Attorney General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5154

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

22pp

QUESTIONS PRESENTED

Whether petitioner has standing under article III of the Constitution to bring this action.

TABLE OF CONTENTS

		Pages
I	JURISDICTION	1
II	CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
III	STATEMENT OF THE CASE	2
	A. Prefatory Statement	2
	B. Relevant Facts	3
ARGUMENT:		
I	EMI HAS NO STANDING UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION	5
	A. Introduction	5
	B. The Undisputed Facts Unequivocally Demonstrate That EMI Has No Standing To Sue	5
	C. The Most Recent United States Supreme Court Decisions Confirm That EMI Has No Standing	9
II	THERE IS NO NEED TO ADDRESS THE MERITS OF EMI'S CLAIM AS IT HAS NO STANDING IN THE FIRST INSTANCE	15
CONCLUSION		16

TABLE OF CASES CITED

Pages

Alcan Aluminium, Ltd. v. Franchise Tax Board (S.D. N.Y. 1983) 558 F.Supp. 624 2

Allen v. Wright (1984) — U.S. — [82 L.Ed.2d 1] 15

American Soc. of Travel Agents, Inc. v. Blumenthal (D.C. Cir. 1977) 566 F.2d 145 11

Arizona v. New Mexico (1976) 425 U.S. 794 14

Bryant v. Yellen (1980) 447 U.S. 352 12

California v. Grace Brethren Church (1982) — U.S. — [73 L.Ed.2d 93] 8

Capitol Industries-EMI, Inc. v. Bennett, cert. denied (1983) — U.S. —, 75 L.Ed.2d 435 ..... 4, 8

Duke Power Co. v. Carolina Env. Study Gp. (1978) 438 U.S. 59 ..... 11, 12

EMI, Ltd. v. William Bennett (N.D. Cal. 1982) 560 F.Supp. 134 ..... 4, 8

EMI, Limited v. William Bennett, et al., (9th Cir. 1984) No. 82-4611 3

EMI Ltd. v. William Bennett et al., No. 81-1088, cert. den. (1982) 1

EMI Ltd. v. William Bennett et al. No. 82-903, cert. den. (1983) 1

Fair Assessment In Real Estate Association, Inc. v. McNary (1981) — U.S. — [70 L.Ed.2d 271] 8

Flast v. Cohen (1968) 392 U.S. 83 11

Kent v. Northern Cal. Reg. Off. of Amer. Friends Services, Com. (9th Cir. 1974) 497 F.2d 1325 11

Limbach v. Hooven & Allison Co. (1984) — U.S. —, 104 S.Ct. 1837 16

TABLE OF CASES CITED—Continued

Pages

Maryland v. Louisiana (1981) 451 U.S. 725 [68 L.Ed. 2d 576] 13

Montana v. United States (1979) 440 U.S. 147 16

Rhode Island Hospital Trust Co. v. Doughton (1926) 270 U.S. 69 7

Rosewell v. LeSalle National Bank (1981) 450 U.S. 503 8

Shell Petroleum, N.V. v. Graves (9th Cir. 1982) 709 F.2d 593 2

Simon v. Eastern Ky. Welfare Rights Org. (1976) 426 U.S. 26 ..... 9, 10, 11

U.S. v. Stauffer Chemical Co. (1984) — U.S. —, 104 S.Ct. 575 16

Valley Forge College v. Americans United (1982) — U.S. — [70 L.Ed.2d 700] 14, 15

STATUTES, CODES AND OTHER AUTHORITIES

United States Constitution, art. III, § 3 ..... 2, 5, 8

Federal Rules of Civil Procedure, rule 17(a) 8

No. 84-613

In The

Supreme Court of the United States

October Term, 1984

EMI LIMITED,

Petitioner,

vs.

WILLIAM BENNETT, and ERNEST J. DRONENBURG, JR., Successor; KENNETH CORY; RICHARD SILBERMAN, and MARY ANN GRAVES, Successor; and MARTIN HUFF and GERALD H. GOLDBERG, Successor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

I

JURISDICTION

The technical jurisdictional requirements appear to be set forth adequately in the petition except that petitioner has failed to establish its standing to sue. It also should be pointed out that this is the third time that petitioner has filed very similar petitions for writ of certiorari on the same basic issue, namely, whether petitioner has standing to sue. (*EMI Limited v. William Bennett, et al.*, No. 81-1088, cert. den. (1982) — U.S. —; *EMI Limited v. Wil-*

liam Bennett, et al., No. 82-903, cert. den. (1983) — U.S. —.) This petition also raises the identical question of standing that was raised in two earlier petitons for writ of certiorari which were denied by this Court, namely, *Alcan Aluminium, Ltd. v. Franchise Tax Bd.* (S.D.N.Y. 1983) 558 F. Supp. 624, aff'd. mem. 2d Cir., cert. den. (1983) — U.S. — [79 L.Ed.2d 170], and *Shell Petroleum, N.V. v. Graves* (9th Cir. 1982) 709 F.2d 593, cert. den. (1983) — U.S. — [78 L.Ed.2d 717].)

II

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, article III, section 3 (standing of plaintiff).

III

STATEMENT OF THE CASE

A. Prefatory Statement

First, in its extensive statement of the case, petitioner has failed to emphasize a crucial fact, namely, that petitioner's wholly owned California subsidiary, Capitol Industries-EMI, Inc. (hereafter referred to as "Capitol"), has pending before the California State Board of Equalization its appeal of the Franchise Tax Board ("FTB") assessment of additional tax based on the unitary method. Capitol has made this appeal without payment of the assessed tax. If Capitol prevails in its administrative action, the unitary assessment will be a nullity and the FTB will not be able to appeal such an adverse decision to the court. But even if Capitol loses on its administrative action, it can still pay the tax and file a suit for refund in the Cali-

fornia superior court like any other taxpayer. A judicial decision favorable to Capitol will avoid the constitutional questions raised here by petitioner.

Second, petitioner spends an extraordinary amount of time talking about the alleged request by FTB from EMI for certain information pertaining to EMI. However, EMI's discussion of this point is completely inappropriate because the Ninth Circuit in the action below found that "The FTB is making demands for information only from Capitol." (*EMI, Limited v. William Bennett, et al.*, July 23, 1984, 9th Cir., No. 82-4611, as cited in petitioner's Appendix A-1, A-6.)[1] This continued reliance by the petitioner on a non-existent fact vividly illustrates the total lack of merit in petitioner's petition.

B. Relevant Facts

Petitioner (hereafter "EMI") is a British corporation which owns substantially all the stock of Capitol, which is a domestic corporation doing business in California.

The FTB is the agency of the State of California administering the income and franchise tax laws of that state.

The named defendants are members of the FTB and the executive officer of the FTB.

---

1. The court reviewed the motion to dismiss on a de novo basis as shown by its statement that "Standing 'is the threshhold question in every federal case, determining the power of the court to entertain the suit.' [Citations.] Because standing is a jurisdictional question, this Court reviews *de novo*. [Citation.]" (*Id.* at A-5). The FTB had erroneously sent one demand letter to EMI in 1975. However, FTB sent no further demands to EMI. Thus, the Ninth Circuit Court found that there was in effect no demand for information by FTB upon EMI.

FTB assessed a tax against *Capitol, not EMI,* under the unitary method.

FTB assessed no tax, did not audit and took no action against EMI, which is outside the jurisdiction of the FTB.

On August 15, 1979, EMI and Capitol filed separate lawsuits in the United States District Court against the named defendants for injunctive and declaratory relief to enjoin the said defendants from assessing a tax against Capitol.

On February 4, 1980, the District Court ordered the lawsuits of both EMI and Capitol dismissed by granting summary judgment to the named defendants; thereafter, both EMI and Capitol appealed to the Court of Appeals, Ninth Circuit.

On February 16, 1982, the Ninth Circuit Court of Appeals remanded the two cases to the district court. (681 F.2d 1107.)

Thereupon, the district court entered an order dismissing Capitol's lawsuit in accordance with the Court of Appeal's directions. Capitol then filed a petition for certiorari (No. 82-688) with this Court, which denied it on December 13, 1982. Thus, the order dismissing Capitol's lawsuit is now final.

In the case of EMI's action, EMI filed a motion for summary judgment in July 1982 and the named defendants filed a motion to dismiss EMI's action on the ground that EMI did not have standing to sue.

On October 8, 1982, the district court granted the named defendants' motion and ordered EMI's action dismissed. (*Capitol Industries-EMI, Inc. v. Bennett,* cert.

denied (1983) — U.S. —, 75 L.Ed.2d 435.) Then on July 23, 1984, the Ninth Circuit Court of Appeals affirmed the dismissal of EMI's action.

ARGUMENT

I

EMI Has No Standing Under Article III Of The United States Constitution

A. Introduction

The essence of EMI's action is found in its statement of the case where it asserts that the named defendants have repeatedly demanded information from EMI and Capitol and that they have unlawfully sought to assess additional taxes against Capitol on the unitary method. EMI has no quarrel with FTB's requiring Capitol to file a unitary return on a domestic basis. Obviously the demand for information issue is an illusory one which only exists in EMI's imagination. After all the court below on a de novo review confirmed the district court finding that "The FTB is making demands for information only from Capitol." (EMI's Petn. App. A-6.) As far as the issue of FTB's assessment against Capitol is concerned, it is nothing more than an egregious attempt by EMI to prevent FTB from lawfully including the unitary portion of EMI's income in the tax formula to determine the amount of Capitol's income which is properly apportionable to California under the unitary method. What makes EMI's action particularly egregious is its filing the instant action when its virtually wholly owned subsidiary, Capitol, is still in the process of exhausting its administrative remedies and has neither paid the assessed tax nor has sought to exercise its judicial remedies in California.

B. The Undisputed Facts Unequivocally Demonstrate That EMI Has No Standing To Sue

On the basis of the undisputed facts, it is clear that EMI has no standing to sue. The named defendants have not demanded any information from EMI. Nor have they assessed or sought to assess any tax against EMI; nor have they sought to take any action against EMI, which is a foreign corporation that does no business in the United States and is not a California taxpayer. EMI is only a shareholder of Capitol, the corporation which does business in California against which the FTB assessed a tax measured by the unitary method. Because EMI has no real basis to support its standing argument, it relies on the speculative contention that, as a shareholder of Capitol, it will suffer the possible loss of diminished dividend income or possible diminution in the value of its shares of Capitol. The premise of these contentions is fallacious.

EMI is separate and independent from Capitol, the corporation against which the FTB assessed the tax. EMI occupies the status of a shareholder of Capitol. Obviously as a shareholder, EMI has no inherent right to receive anything from Capitol. It certainly does not have the right to receive dividends, whether monthly, quarterly, annually or in any other form. In fact, as a shareholder of Capitol, EMI owns neither the corporate property nor the corporate earnings of Capitol; it simply has an expectancy in each. This well-established proposition was stated by the United States Supreme Court in these words:

> "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation

have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property." (*Rhode Island Hospital Trust Co. v. Doughton* (1926) 270 U.S. 69, 81.)

Furthermore, the threatened injury to EMI is too remote and speculative to meet standing requirements. As discussed above, EMI as a stockholder has no inherent right to receive anything from Capitol. The expectant interest which EMI has in the earnings of Capitol does not entitle it to receive dividends, whether monthly, quarterly, annually, or in any other form on its stockholdings. Moreover, a corporation's declaration of dividends generally is dependent not on earnings alone, but also on such factors as corporate expansion plans, the need to increase cash reserves and the like. Thus, whether EMI will be adversely affected by proposed tax assessments against Capitol—or benefited if such assessments are held invalid—is entirely a matter of conjecture. Even if it should be ruled that the unitary tax as applied to Capitol is unconstitutional, there is absolutely no assurance that EMI will realize any concrete benefit. At this point, there are many possibilities, but one thing is certain: it is anyone's guess whether EMI will be out-of-pocket if the assessments against Capitol are sustained by the California state courts.

As the Ninth Circuit said:

"Generally, a shareholder does not have standing to redress an injury to the corporation in which it holds stock. *Shell Petroleum, N.V. v. Graves,* 709 F.2d 593, 595 (9th Cir.), *cert denied,* 104 S.Ct. 537 (1983); *Sherman v. British Leyland Motors, Ltd.,* 601 F.2d 429, 439-40 (9th Cir. 1979) (sole shareholder had no standing to assert either federal or state law claims); *Von Brimer v. Whirlpool Corp.,* 536 F.2d 838, 846 (9th Cir. 1976) (majority shareholder may not assert state law claims despite economic injury to him); *Er-*

lich v. Glasner, 418 F.2d 226 (9th Cir. 1969) (sole shareholder could not maintain an action under 41 U.S.C. § 1983).

"To have standing to maintain an action, a shareholder must assert more than personal economic injury resulting from a wrong to the corporation. *Von Brimer v. Whirlpool*, 536 F.2d at 846. A shareholder must be injured directly and independently of the corporation. *Id.; Erlich v. Glasner*, 418 F.2d at 228; *Graves*, 709 F.2d at 595." (*Capitol Industries-EMI, Inc. v. Bennett, supra*, EMI's App. A-6 to A-7.)

The Ninth Circuit's ruling without any doubt is correct and applicable here where EMI is claiming potential injury from proposed California tax assessments against Capitol, its American corporate subsidiary.[2]

---

2. Stockholders have been denied relief in such actions either on the ground that they lacked "standing" or that the corporation was the "real party in interest" under rule 17(a), Federal Rules of Civil Procedure. If it is found that a stockholder complaining of injury to a corporation meets the technical requirements of standing but does not satisfy the real party in interest rule, it would appear that the prohibition contained in 28 U.S.C. section 1341 could still provide a basis for dismissal of actions of this kind. For example, it is clear in the present case that Capitol has a "plain, speedy and efficient" remedy in the state courts. Hence, its joinder as the real party in interest would oust this Court of jurisdiction. Moreover, the recent decisions in *Fair Assessment in Real Estate v. McNary* (1981) — U.S. — [70 L.Ed.2d 271], *Rosewell v. LaSalle National Bank* (1981) 450 U.S. 503, reh. den. (1981) — U.S. — and *California v. Grace Brethren Church* (1982) — U.S. —, 73 L.Ed.2d 93, emphasized the strong policy against federal interference with the fiscal operations of a state. If a state provides an adequate remedy for challenge of a tax assessment, there is no apparent reason why section 1341 should not bar a federal action by an "interested nontaxpayer" as well as the taxpayer directly concerned. It is incongruous to suggest that a state can avoid the disruptive effect of federal injunctive relief in such cases by opening up its tax proceedings to interested third parties—a cure likely to be as disruptive as the ailment.

Therefore, in light of the nature of EMI's interest in Capitol, EMI cannot truly show any injury. Nor can EMI show that the relief it seeks will correct the matter. Nor is an adjudication in this case necessary because Capitol will be the best proponent of its own rights regarding the applicability to it of the unitary method of taxation. Finally, there is no obstacle to Capitol asserting its rights before the California court. Moreover, Capitol can raise in the California court all of the defenses that EMI seeks to raise here, including challenges to the constitutionality of the unitary method of taxation.

C. The Most Recent United States Supreme Court Decisions Confirm That EMI Has No Standing

In the last few years there have been several major decisions involving the question of standing. However, in none of these cases has this Court expanded the standing doctrine to a person such as EMI, which was indirectly affected by some governmental action, or where the directly affected person had a remedy in the state courts, or where that person was actually litigating the identical issues against the same defendant in the state courts.

The doctrine of standing was succinctly summarized in *Simon v. Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26 [48 L.Ed.2d 450, 96 S.Ct. 1917]. This Court stated:

> "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See *Flast v. Cohen,* 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947, 959 (1968). The concept of standing is part of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from de-

> ciding political questions, standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' *Id.*, at 99, 88 S.Ct., at 1952, 20 L.Ed.2d at 961.
>
> As we reiterated last Term, the standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' *Warth v. Seldin,* 422 U.S. 490, 498-499, 95 S.Ct. 219, 2205, 45 L.Ed.2d 343, 354 (1975) (emphasis in original). In sum when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." (426 U.S. at pp. 37-38.)

In the *Eastern Ky.* case, several indigents and organizations brought suit against the Secretary of Treasury and Internal Revenue Service Commissioner, challenging a Revenue Ruling which granted favorable tax treatment to a nonprofit hospital. This Court rejected the challenge and set forth as a standing prerequisite the need for the plaintiff to show "an injury to himself that is likely to be redressed by a favorable decision." Here not only is EMI's purported injury speculative, there is absolutely no assurance of redress. Even if this Court should rule that the unitary tax as applied to Capitol is unconstitutional, there is absolutely no assurance that Capitol will declare a larger dividend to EMI or that its value in the Capitol stock will be enhanced. Moreover, in a concurring opinion, Justice Stewart expressed the applicable maxim of tax law in the following words:

> "I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." (*Id.*, at 46.)

The *Eastern Ky.* decision was cited as controlling authority in *American Soc. of Travel Agents, Inc. v. Blumenthal* (D.C. Cir. 1977) 566 F.2d 145, cert. den. (1978) 435 U.S. 947, 98 S.Ct. 1533, where it was held that an association of travel agents and individual travel agencies had no standing to complain of the failure of federal tax authorities to assess taxes on certain income received by tax-exempt organizations, even though the organizations were in competition with plaintiffs. Similarly, in *Kent v. Northern Cal. Reg. Off. of Amer. Friends Services, Com.* (9th Cir. 1974) 497 F.2d 1325, a group of taxpayers objecting to the federal tax on telephone services placed their tax payments into a trust pending a determination of the legality of the tax. The trustee filed an interpleader action to settle adverse claims to the fund and also sought injunctive relief. Relying on the earlier opinion in *Flast v. Cohen* (1968) 392 U.S. 83 [20 L.Ed.2d 947, 88 S.Ct. 1942], the Ninth Circuit Court of Appeals held that the trustee had standing to assert an interpleader action, but had no standing to enjoin the collection of taxes from the taxpayer themselves.

The next major standing case decided by this Court was *Duke Power Co. v. Carolina Env. Study Gp.* (1978) 438 U.S. 59, where it extended standing to an environmental organization, a labor union, and a number of residents near certain planned nuclear plants. It was not difficult for this Court to find standing in *Duke Power* because the case involved "the question of whether Congress may, con-

sistent with the Constitution, impose a limitation on liability for nuclear accidents resulting from the operation of private nuclear power plants licensed by the Federal Government." (*Id.*, at pp. 62-63.) There is no analogy between the interests of the various plaintiffs in *Duke Power*, where the threatened nuclear injury was pervasive and compensation for damages from injury would have been unconstitutionally circumscribed, and the interest of EMI, a foreign corporation, which seeks to overthrow the sovereign taxation power of the State of California.

Duke Power was followed by *Bryant v. Yellen* (1980) 447 U.S. 352, where the United States government filed a declaratory relief action to ascertain whether section 46 of a particular law applied to leased lands. There when the district court ruled against the United States, the latter forewent an appeal of that adverse decision. Thereupon certain persons intervened to press an appeal on their own behalf because that case was the only vehicle now available to them to have determined the question of the applicability of section 46. If section 46 applied, then the intervenors would have the possibility of purchasing certain lands. This Court extended standing to the intervenors on appeal because, if they prevailed on their contention that section 46 of the law applied, they would have the possibility of purchasing the land. On the other hand, if the adverse decision was not appealed by the intervenors in light of the United States government's failure to do so, the intervenors would never have the possibility of purchasing the land.

Obviously, the facts in *Bryant v. Yellen, id.*, are completely dissimilar from those in this lawsuit. Here Capitol

is capable of asserting its legal rights in the state court. To date it has pursued every possible administrative procedure available, and if it fails in those efforts, it can pay the tax and file a suit for refund in the state court.

The next case, *Maryland v. Louisiana* (1981) 451 U.S. 725 [68 L.Ed.2d 576], is *sui generis* and clearly distinguishable. There, various states sued the State of Louisiana requesting a declaration that Louisiana's "first-use" tax was unconstitutional. This Court accepted original jurisdiction and found that the plaintiff states had standing because "The plaintiff States are substantial consumers of natural gas. . . . It is clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the First-Use Tax, are directly affected in a 'substantial and real' way so as to justify their exercise of this Court's original jurisdiction." (*Id.*, at pp. 736-737.)

This Court also went on to find a second and alternate basis for standing in these words:

> "Jurisdiction is also supported by the State's interest as *parens patriae*. A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. ([Citations.] But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." (*Id.*, at 590.)

This Court then pointed out another factor favoring standing, namely, that "individual consumers . . . are foreclosed from suing for refund in Louisiana's courts." (*Id.*, at p. 591.) However, in the case of EMI, not only was the tax assessed against Capitol, the latter can still file

a suit for refund in the state court. This case is similar to *Arizona v. New Mexico* (1976) 425 U.S. 794, 797, where this Court refused federal standing and held:

> "[I]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." (Emphasis in original.)

Then, very recently in its decision in *Valley Forge College v. Americans United* (1982) — U.S. — [70 L.Ed.2d 700], this Court reiterated the rule that "[t]he exercise of judicial power . . . is . . . restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the Court adjudicate." (*Id.*, at p. 710.) This Court also made clear that "injury in fact" must consist of something more than the invasion of an "individuated right" or "personal constitutional right" to a governmental observance of the Constitution. Rejecting the motion that mere allegation of a legal right is sufficient to confer standing, the court stated ". . . assertion of a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." (*Id.*, at p. 717.)

The *Valley Forge* case involved a claim by citizens and taxpayers of the United States that the government's conveyance of surplus property to a college operated by a religious order violated the Establishment Clause. Clearly, no less exacting standards for determining the standing of a litigant can apply in actions brought by a foreign corporation, such as EMI, which seeks to advance the rights of its domestic subsidiary. Here the proposed assessments to which EMI objects are directed against Capitol, which

is a domestic corporation doing business in California. The FTB has no jurisdiction to assert any tax or other demands against EMI and has not done so.

Stripped down to its essentials, the complaint filed by EMI shows that it is merely a concerned by stander in a pending controversy between the FTB and Capitol. It is evident that EMI has an interest in the final outcome of that controversy. This admitted interest, however, will not suffice insofar as standing is concerned. " '[T]hat concrete adverseness which sharpens the presentation of issues,' *Baker v. Carr,* 369 U.S. [186] at 204, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself." (*Valley Forge College v. Americans United, supra,* 70 L.Ed.2d 718.)[3]

No palpable "injury in fact" to EMI has been alleged in this action. Its only claim is that the proposed assessments, if allowed to stand, will result in a dimunition in value of its shareholding interest in Capitol.

II

There Is No Need To Address The Merits Of EMI's Claim As It Has No Standing In The First Instance

---

3. In the just concluded term, the United States Supreme Court held that parents of Black public school children lacked standing in an action which alleged that the IRS had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. (*Allen v. Wright* (1984) — U.S. — [82 L.Ed.2d 1].) Although the facts of the case are distinguishable from those here, the *Allen* decision demonstrates the Supreme Court's reluctance to find standing, even though injuries caused by racial discrimination may have been present.

EMI's discussion of the merits of its action are totally inappropriate and irrelevant. Despite the fact that EMI admits that "Because the briefs below were on the issue of standing to sue and the propriety of the dismissal of the complaint on that ground, the merits of the case were not briefed" (EMI's Petn., p. 15), it spends half of its petition arguing about the merits of the case. EMI uses the case of *Montana v. United States* (1979) 440 U.S. 147, 163-164, to justify its discussion of the merits of the case, apparently on its conjecture that Capitol may be precluded from raising certain issues in a subsequent California state court action.

First, if Capitol is precluded from raising those issues, then it was occasioned only by EMI's abortive action here and there is no need for this Court to rescue EMI from its improvident conduct. Second, EMI's speculative reference to *Montana v. United States, id.,* is ambiguous and vague and deserves no attention whatsoever from this Court. Third, the United States Supreme Court's recent decisions, *Limbach v. Hooven & Allison Co.* (1984) — U.S. —, 104 S.Ct. 1837 and *U.S. v. Stauffer Chemical Co.* (1984) — U.S. —, 104 S.Ct. 575, cast doubt on EMI's interpretation of *Montana v. United States, supra.*

CONCLUSION

In summary, EMI has completely failed to establish that it has standing to sue. The demand for information issue is nonexistent. EMI has not cited a single authority that EMI can prevent FTB from assessing a tax against Capitol, which is a domestic corporation doing business in California. Thus, we respectfully submit that

EMI's action is totally devoid of merit and that the petition should be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

EDWARD P. HOLLINGSHEAD
Deputy Attorney General
COUNSEL OF RECORD

CHARLES C. KOBAYASHI
Deputy Attorney General

Attorneys for Respondents

Office-Supreme Court, U.S.
FILED
NOV 20 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EMI LIMITED,

Petitioner,

v.

WILLIAM BENNETT, AND ERNEST J. DRONENBURG, JR., SUCCESSOR; KENNETH CORY; RICHARD SILBERMAN, AND MARY ANN GRAVES, SUCCESSOR; AND MARTIN HUFF AND GERALD H. GOLDBERG, SUCCESSOR,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE UNITED KINGDOM AS *AMICUS CURIAE* SUPPORTING CERTIORARI

GEORGE W. BEATTY
(Counsel of Record)
WILLIAM L. GOLDMAN
JAMES A. RIEDY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8500
Counsel for Amicus Curiae

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

53PP

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
I. This Case Differs From Prior Cases In Which Foreign Parent Companies Have Asserted Standing To Challenge Unitary State Income Taxes.	5
II. The Potential Injuries To Petitioner In This Case Give Petitioner Standing To Challenge The Constitutionality Of California's Request For Worldwide Financial Data Of Corporations Doing No Business In California.	7
III. The Federal Courts Should Exercise Jurisdiction In Cases Such As This Involving Questions Of International Law And Considerations Of Comity Among Nations.	12
CONCLUSION	14
APPENDIX A	1a

TABLE OF AUTHORITIES

CASES: Page

Alcan Aluminium v. *Department of Rev. of State of Or.*, 724 F.2d 1294 (7th Cir. 1984) 5, n.4; 6

Alcan Aluminum Ltd. v. *Franchise Tax Bd. of Cal.*, 558 F.Supp. 624 (S.D.N.Y. 1983), *aff'd mem.*, 2nd Cir., *cert. denied*, 464 U.S. ____, 79 L.Ed.2d 170 (1984) 5, 7

Capitol Industries-EMI, Inc. v. *Bennett*, 681 F.2d 1107 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982) 7, 10

Container Corp. v. *Franchise Tax Bd.*, 463 U.S. ____, 77 L.Ed.2d 545 (1983) 13, n.9; 14

Dyson v. *Attorney-General*, 1 K.B. 410 (1911) 12

Flast v. *Cohen*, 392 U.S. 83 (1968) 12

In re Grand Jury Proceedings, 691 F.2d 1384 (11th Cir. 1982), *cert. denied sub nom. Bank of Nova Scotia* v. *United States*, 462 U.S. 1119 (1983) 13

National Restaurant Ass'n v. *Simon*, 411 F.Supp. 993 (D. D.C. 1976) 11

Nuclear Engineering Co. v. *Scott*, 660 F.2d 241 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982) 10

Shell Petroleum, N.V. v. *Graves*, 709 F.2d 593 (9th Cir. 1983), *cert. denied*, 464 U.S. ____, 78 L.Ed.2d 717 (1983) 5; 13, n.8

South Carolina v. *Regan*, 465 U.S. ____, 79 L.Ed.2d 372 (1984) 11

United States v. *First Nat. Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983) 9, 13

United States v. *SCRAP*, 412 U.S. 669 (1973) 12

United States v. *Toyota Motor Corp.*, 569 F.Supp. 1158 (C.D. Cal. 1983), *appeal pending* (9th Cir.) 13

United States v. *Vetco, Inc.*, 691 F.2d 1281 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981) 13

Warth v. *Seldin*, 422 U.S. 490 (1975) 4; 6, n.5; 9; 12

Table of Authorities Continued

Page

STATUTES:

Internal Revenue Code, section 6038A 8, n.7

PUBLICATIONS:

Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States in 1982*, 63 Survey of Current Business 31 (Aug. 1983, No. 8) 3

N.Y. Times, Sept. 30, 1983, § A, at 3 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-613

EMI LIMITED,

Petitioner,

v.

WILLIAM BENNETT, AND ERNEST J. DRONENBURG, JR., SUCCESSOR; KENNETH CORY; RICHARD SILBERMAN, AND MARY ANN GRAVES, SUCCESSOR; AND MARTIN HUFF AND GERALD H. GOLDBERG, SUCCESSOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE UNITED KINGDOM AS *AMICUS CURIAE* SUPPORTING CERTIORARI[1]

INTEREST OF *AMICUS CURIAE*

Petitioner's briefs in the proceedings below cover a wide spectrum of issues relating to the constitutionality of applying a unitary state income tax to a U.S. subsidiary of a U.K. parent corporation. The British Government

[1] Petitioner and respondents have filed letters with the Clerk of this Court consenting to the filing of this *amicus curiae* brief.

has repeatedly and forcefully objected to the imposition of such taxes.[2]

This *amicus* brief is being filed for the more limited purpose of urging the Court to resolve a question involving standing that also has major international ramifications. Simply put, the question is whether a British parent corporation has standing in the U.S. Federal courts to challenge the constitutionality of demands made by a taxing State for the production of financial data relating to the worldwide operations of the parent and its foreign subsidiaries, none of whom is doing business in the taxing State or elsewhere in the United States.

---

[2] During Prime Minister Thatcher's visit with President Reagan in September, 1983, the Prime Minister said that "something will have to be done" to limit the effects of the unitary tax, adding that Britain considers the issue "serious." N.Y. Times, Sept. 30, 1983, § A, at 3, col. 1. Copies of the following documents, which express the United Kingdom's opposition to the unitary tax, are reproduced in Appendix A, *infra:*

(a) Note Submitted to the Department of State by the Member States of the European Community (including the United Kingdom), the European Commission and the Embassies of Australia, Canada, Japan and Switzerland for the Attention of the U.S. Treasury Working Group on Worldwide Unitary Taxation (App. 1a).

(b) Statement of the Government of the United Kingdom Before the U.S. Treasury Working Group on Worldwide Unitary Taxation (App. 3a).

(c) Letter Dated July 12, 1983 from the Chancellor of the Exchequer to the Secretary of the Treasury (App. 19a).

(d) Note Submitted by the United Kingdom to the Department of State dated May 18, 1982 (App. 21a).

(e) Note Submitted by the United Kingdom to the Department of State dated October 30, 1981 (App. 23a).

(f) Note Submitted by the United Kingdom to the Department of State dated March 25, 1980 (App. 26a).

As discussed below, the burden of such requests falls squarely on the British parent corporation. Nonetheless, the decision below leaves the parent corporation without any forum in which to challenge the imposition of this burden.

Businesses headquartered in the United Kingdom have made direct investments in the United States of over $23 billion, which is more than the amount invested by any other nation.[3] Because of the extensive U.K. investment in the United States, the participation by U.K. corporations in business activities involving both the United States and third countries, and the adverse impact that the decision below will have on those activities, the British Government has a significant interest in the disposition of this petition for certiorari.

SUMMARY OF ARGUMENT

The standing argument being made in this case is distinctly different from the standing arguments raised in other cases where foreign parent corporations have attacked the constitutional validity of unitary state income taxes.

Petitioner has alleged that California's request for worldwide financial data threatens to injure petitioner in two ways. First, petitioner has alleged that delivery of some of the requested information to California would violate the British Official Secrets Act and would subject petitioner's executives to criminal penalties. Second, petitioner has alleged that much of the requested information is not readily available. For purposes of this proceeding, petitioner's allegations must be accepted as

---

[3] Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States in 1982*, 63 Survey of Current Business 31, 36 (Aug. 1983, No. 8).

true under this Court's decision in *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

The burden imposed on petitioner by a request for information which is not readily available, and the threat of criminal penalties if some of that information is produced, give petitioner an immediate and significant personal stake in this proceeding. By its very nature, the request for financial data relating to petitioner and its non-U.S. subsidiaries can be satisfied only by petitioner. Because the *burden* of complying with the request falls on petitioner, not on its U.S. subsidiary, petitioner rather than the U.S. subsidiary is the proper party to assert that the request imposes a constitutionally impermissible burden on foreign commerce.

It is no answer to say, as the court below did, that petitioner can avoid the burden by declining to comply with the request. As the court below acknowledged (Pet. App. A-6), such action would result in a "threatened increase" in the California tax otherwise payable by petitioner's U.S. subsidiary under California's unitary system. This "threatened increase" in the tax properly payable by the subsidiary under California law constitutes, in substance, a threatened tax on petitioner to force compliance. Thus, petitioner is threatened with harm whether or not it complies. Moreover, the threatened injury is not one that can be adequately avoided in subsequent proceedings brought by the U.S. subsidiary to test the constitutionality of the unitary tax as applied to the subsidiary.

The conclusion that petitioner has standing to seek relief from the injuries threatened here is reinforced by considerations of international law and comity. The international friction that has already been generated by information requests of the type involved here will be exacerbated if the United States shuts the doors of its

courts to the foreign parent companies adversely affected by such requests. Because the foreign parents are the real parties in interest, they should be afforded an opportunity to argue the merits of their own constitutional assertions.

ARGUMENT

I. This Case Differs From Prior Cases In Which Foreign Parent Companies Have Asserted Standing To Challenge Unitary State Income Taxes.

The standing argument presented in this case is entirely different from the standing arguments advanced unsuccessfully in *Shell Petroleum, N.V.* v. *Graves*, 709 F.2d 593 (9th Cir. 1983), *cert. denied*, 464 U.S. ____, 78 L.Ed.2d 717 (1983), and *Alcan Aluminum Ltd.* v. *Franchise Tax Bd. of Cal.*, 558 F.Supp. 624 (S.D.N.Y. 1983), *aff'd mem.*, 2d Cir., *cert. denied*, 464 U.S. ____, 79 L.Ed. 2d 170 (1984). In those cases, the foreign parent corporations based their standing arguments on allegations that California was, in effect, subjecting the foreign parents' separate income to multiple taxation. Standing was denied on the ground that California was taxing only the income of the U.S. subsidiary corporations, with the result that each parent corporation's harm was only that of a shareholder whose investment in its corporation was being diminished in value.[4]

---

[4] In addition, jurisdiction was denied in the *Shell* case, *supra*, and *Alcan Aluminium* v. *Department of Rev. of State of Or.*, 724 F.2d 1294 (7th Cir. 1984) on the separate ground that the actions were not ripe. The issue of ripeness is not present in this case since California already has assessed a tax against petitioner's U.S. subsidiary, Capitol Industries-EMI, Inc. ("Capitol").

Similarly, the fact that petitioner's prior petitions for certiorari have been denied should have no bearing here. Those petitions were filed before the decision below by the court of appeals in an effort to join this case with other cases involving unitary issues then pending before this Court.

By contrast, petitioner's standing argument here is based on the uncontested fact that petitioner *itself* will be directly burdened as a consequence of California's request for detailed financial information covering petitioner and its worldwide non-U.S. subsidiaries.[5] This standing argument was not presented to the Court in the other cases in which certiorari was denied. In particular, the *Shell* and *Alcan* cases, *supra*, did not involve any threatened violation of foreign law that might subject the petitioners' employees in those cases to criminal penalties.

Moreover, to the extent that the standing argument being made here was adverted to in the other cases, the clear suggestion was that standing would be established if the foreign parent made an adequate factual showing of its harm. For example, in *Alcan Aluminium* v. *Department of Rev. of State of Or.*, *supra*, the court of appeals distinguished *Shell*, stating (724 F.2d at 1299):

> In *Shell*, however, the parent's only alleged injury was as a shareholder of its subsidiary. The parent alleged no independent injury as a basis for standing. *Id.* at 595. Thus, the subsidiary's state remedy fully protects the parent's interests. The present case is distinguishable. Appellant has alleged an independent injury as a basis for standing. It claims an unconstitutional burden on its foreign commerce. If

---

[5] Petitioner's complaint in the district court alleged in Count VI that "Much of the information requested [by California] is not published by or readily available to EMI." For purposes of deciding the standing issue, these allegations must be accepted as true. *Warth* v. *Seldin*, *supra*, 422 U.S. at 501. Obviously, a request to furnish information that is not readily available places a direct burden on petitioner. Moreover, as discussed at p. 9, *infra*, compliance with California's request could subject petitioner's employees to possible criminal penalties in the U.K. Thus, the threatened harm to petitioner is twofold.

> appellant's allegations as to its standing are accepted as true, its interests and those of Alcancorp are not identical. *See also Capitol Industries-EMI, Inc.* v. *Bennett*, 681 F.2d at 1118-19 & n.30. Thus, Alcancorp's state remedy does not protect appellant fully. As soon as the tax is assessed against Alcancorp, the threat of injury to appellant will be immediate. Nothing in the Tax Injunction Act requires appellant to wait while Alcancorp pursues its own remedies under Oregon law for its own injury.

See also Alcan Aluminum Ltd. v. *Franchise Tax Bd. of Cal., supra*, 558 F.Supp. at 628 n.9.

The clear suggestion by the court of appeals that Alcan would have standing once its case was ripe is in apparent conflict with the decision below. This Court should consider the standing issue presented here in order to resolve the conflict on an issue having obvious and important international implications.

II. The Potential Injuries To Petitioner In This Case Give Petitioner Standing To Challenge The Constitutionality Of California's Request For Worldwide Financial Data of Corporations Doing No Business In California.

1. The court of appeals erred in holding that petitioner lacks standing. The critical error was the court's conclusion (Pet. App. A-6) that ". . . EMI's only possible injury is the diminution in value of its holdings in Capitol."

To the contrary, petitioner has alleged its own, personal harm that is separate and distinct from the tax liability assessed by California against Capitol. Petitioner's own direct harm is twofold. First, the burden of generating the worldwide financial data requested in this and other similar cases is substantial in terms of time, effort and cost. Generally the data do not exist as such, but must be especially generated, and then converted into dollars at

differing current and historical exchange rates. Separate sets of computations may have to be made for different States that apply different accounting standards.[6] EMI has 63 non-U.S. subsidiaries that would be covered by California's request in this case. Other U.K. parents affected by similar requests have well over 100 such subsidiaries. Her Majesty's Government believes that it imposes an intolerable burden on foreign commerce to require a United Kingdom parent company to obtain and deliver to the California tax authorities detailed financial data, stated in U.S. dollar terms, for scores of worldwide subsidiaries that do *no business* in California or elsewhere in the United States and have *no business contacts* with the U.S. subsidiary that does do business there.[7]

---

[6] The problem of trying to convert the books and records of a worldwide business conducted by a U.K. parent corporation into figures computed in U.S. dollars on the basis of U.S. tax and accounting principles is clearly set forth in the comments submitted by the Confederation of British Industry to the U.S. Working Group on Worldwide Unitary Taxation (Dec. 1983). Those comments are reproduced in Appendix A, *infra* (App. 30a).

[7] By contrast, Federal tax law requires that domestic subsidiaries of foreign parents provide information only with respect to those foreign affiliates that had a "transaction with" the reporting domestic company; moreover, the information that must be furnished in those cases is limited to readily available information regarding the foreign affiliate and the transactions conducted with it. See Internal Revenue Code, section 6038A. Thus, California is here seeking worldwide financial data that goes far beyond the limited *transactional* data that must be furnished to comply with Federal law. The British Government believes that U.K. parent companies directly affected by sweeping state requests of the type involved here have standing to assert that the marked difference between the state and Federal requirements confirms the conclusion that the state requirements impose a constitutionally impermissible burden on foreign commerce.

In addition to being burdensome, California's request for information could expose petitioner's employees to possible criminal penalties in the U.K. Petitioner's complaint in this case alleges in Count VII that "Some of the information sought is protected from disclosure by the British Official Secrets Act and by similar legislation in other countries, and were it to be divulged, to Defendants' staff or to others, EMI's executives would become liable to criminal proceedings in the United Kingdom and other countries."

Surely, the possibility that delivery of the documents might lead to criminal sanctions against petitioner's own employees gives petitioner standing to assert in the Federal courts that the demand for delivery made by California is an unconstitutional restraint on foreign commerce. Petitioner's threatened injury is "distinct and palpable." *Warth* v. *Seldin*, *supra*, 422 U.S. at 501.

There should be no question that *standing* to raise the issue exists when one recognizes that, on its *merits*, the issue is a serious one involving "a sensitive balancing of the competing interests at stake." *United States* v. *First Nat. Bank of Chicago*, 699 F.2d 341, 345 (7th Cir. 1983).

2. Petitioner is the real party in interest in this proceeding. California originally directed its demand for information to petitioner and only belatedly redirected the demand to Capitol. Even in cases where demands for worldwide financial data are originally addressed to the subsidiary doing business in the taxing State, the taxing authorities must know that compliance will require parent company action. There is no conceivable way that a California subsidiary is going to be able to obtain data from its foreign parent company or from other foreign subsidiaries unless the common parent undertakes to make such data available. Because the *burden* of complying falls on the foreign parent, not on the domestic sub-

sidiary, it is the parent and not the subsidiary who should have standing to seek declaratory judgment relief.

3. It is no answer to say, as the court below did (Pet. App. A-6), that petitioner itself will suffer no direct harm if it chooses not to comply with California's demand for worldwide financial data. If that happens, California will make arbitrary assumptions which will *increase* the tax that would otherwise be payable by Capitol under California's unitary method. This "threatened increase," which the court below recognized (Pet. App. A-6), will in form be assessed against Capitol. But the increment in tax attributable to petitioner's refusal to supply information will in reality be a tax on petitioner to force its compliance. Thus, the cases cited by the court below (Pet. App. A-6), involving shareholders whose only interest was a threatened diminution in the value of their stock, are simply not in point. In each of those cases, the potential harm to the subsidiary arose solely as a consequence of its own separate actions and did not reflect indirect pressure being exerted to compel certain action by the parent corporation.

The alternative harms to petitioner are obvious. Petitioner is faced with "immediate business costs" if it complies with California's request or "immediate coercive consequences" if it does not. *Nuclear Engineering Co.* v. *Scott*, 660 F.2d 241, 252 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982).

4. It has already been established that "California does not provide [petitioner] with an effective state remedy for its claims." *Capitol Industries-EMI, Inc.* v. *Bennett*, 681 F.2d 1107, 1119 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982). Thus, if the decision below is permitted to stand, petitioner will be foreclosed from all judicial review.

The decided case closest in principle to the present one is this Court's recent decision in *South Carolina* v. *Regan*, 465 U.S. ____, 79 L.Ed. 2d 372 (1984) in which the Court held that jurisdiction was not barred by the Anti-Injunction Act where the party aggrieved would not otherwise have access to judicial review. The Court rejected the possibility that South Carolina's interest in that case could adequately be advanced in suits brought by third-party taxpayers. The result should be the same here.

It is highly doubtful whether Capitol will ever have standing to advance petitioner's separate constitutional claims. See *South Carolina* v. *Regan*, *supra*, 79 L.Ed. 2d at 383. But even if such standing does exist, petitioner's objection to California's information request cannot adequately be pursued in proceedings brought by Capitol since that route will entail heightened risks to Capitol.

If Capitol attempts to litigate the constitutionality of California's request for information after petitioner has refused to comply, Capitol will face a "threatened increase" in tax (Pet. App. A-6) and possible penalties (Petitioner's Complaint, Count VI) by reason of such refusal. In this respect, the present case is analogous to *National Restaurant Ass'n* v. *Simon*, 411 F.Supp. 993 (D. D.C. 1976) where the court held that the Anti-Injunction Act did not prevent the plaintiff-employer from seeking an injunction against enforcement of an Internal Revenue Service ruling requiring employers to report certain tips paid to their employees. The Government argued that the court lacked jurisdiction to consider injunctive relief because the plaintiff could test the validity of the reporting requirements by failing to report the tips and contesting the $1 fine which the Government could impose for each such failure. The court rejected the Government's argument on the ground that it put the

plaintiff in the "untenable position" of risking a fine "merely to test the validity of a reporting and information requirement." (411 F.Supp. at 996). That is precisely the position Capitol would be in if it attempted to test the validity of California's request for information in this case.

Given the international implications of this case, *amicus* wishes to point out that the court of appeal in England came to a similar conclusion in *Dyson* v. *Attorney-General*, 1 K.B. 410 (1911). In that case, the court held that a taxpayer who was threatened with penalties if he failed to comply with a request for tax information could bring a declaratory judgment proceeding against the Attorney General to test the validity of the request. In his opinion, Farwell L. J. stated (1 K.B. at 421):

> It is obviously a question of the greatest importance; more than eight millions of Form IV. have been sent out in England, and the questions asked entail much trouble and in many cases considerable expense in answering; it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty.

III. The Federal Courts Should Exercise Jurisdiction In Cases Such As This Involving Questions Of International Law And Considerations Of Comity Among Nations.

This Court has considered the question of standing in numerous contexts. See, *e.g.*, *Warth* v. *Seldin*, *supra*; *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Flast* v. *Cohen*, 392 U.S. 83 (1968). "This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth* v. *Seldin*, *supra*, 422 U.S. at 498. For the reasons previously

discussed, there should be no question that the threshold constitutional requirement of justiciability has been satisfied in this case.[8] The British Government urges the Court to grant certiorari to decide whether the court below properly exercised the "prudential limitation" on its jurisdiction.

It is well recognized that cases involving requests for information from foreign parties present special issues of international law and comity among nations. *United States* v. *Toyota Motor Corp.*, 569 F.Supp. 1158 (C.D. Cal. 1983), *appeal pending* (9th Cir.); *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied sub nom. Bank of Nova Scotia* v. *United States*, 462 U.S. 1119 (1983); *United States* v. *Vetco, Inc.*, 691 F.2d 1281 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981); *United States* v. *First Nat. Bank of Chicago*, *supra*. Requests of the type made in this case have had, and are continuing to have, an adverse impact on commercial relations between the United States and most of its major trading partners.[9] Foreign parent corporations as well as foreign governments (including *amicus*) believe it is inherently unfair to close the courts of the United States to foreign parents who are seeking to challenge the validity of such requests under the Federal Constitution. Under these circumstances, in a case involving serious questions of foreign relations where the denial of jurisdiction will create "international friction" (*United States* v. *Vetco, Inc.*, *supra*, 691 F.2d at 1388), the Federal courts should exercise their discretion in favor of finding jurisdiction.

---

[8] In *Shell Petroleum, N.V.* v. *Graves*, *supra*, the court of appeals acknowledged (709 F.2d at 595) that the decision denying standing "was based on prudential rather than Constitutional grounds."

[9] See n.2, *supra* and *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. ____, 77 L.Ed.2d 545, 577 n.4 (1983) (Powell, J., dissenting).

CONCLUSION

This case affords the Court an opportunity to consider the constitutionality of unitary taxation in the foreign parent context, a question left unanswered in *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. ____, 77 L.Ed. 2d 545 (1983). The British Government is anxious to have that issue resolved. But even if the Court chooses not to answer all of the important issues in this case at this time, *amicus* strongly urges that the Court at least grant certiorari in order to consider the important, separate question of standing.

Respectfully submitted,

GEORGE W. BEATTY
(Counsel of Record)
WILLIAM L. GOLDMAN
JAMES A. RIEDY
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-8500
Counsel for Amicus Curiae

November 20, 1984

APPENDIX

APPENDIX A

NOTE SUBMITTED TO THE DEPARTMENT OF STATE BY THE MEMBER STATES OF THE EUROPEAN COMMUNITY (INCLUDING THE UNITED KINGDOM), THE EUROPEAN COMMISSION AND THE EMBASSIES OF AUSTRALIA, CANADA, JAPAN AND SWITZERLAND FOR THE ATTENTION OF THE U.S. TREASURY WORKING GROUP ON WORLDWIDE UNITARY TAXATION

The Embassies of the Member States of the European Community, the European Commission and the Embassies of Australia, Canada, Japan and Switzerland present their complements to the Department of State. A copy of this Note is also being delivered to the Department of the Treasury for the attention of the Working Group on Worldwide Unitary Taxation.

Our countries constitute the United States' main trading partners, accounting for more than half of US trade. We also account for approximately $76 billion of direct investment in the United States (84% of the total) and US direct investment in our countries amounts to $154 billion (69% of total US direct investment abroad). Our governments are all deeply concerned about the use of the worldwide unitary basis of taxation in some individual States of the United States of America and have submitted our views to the Working Group set up by the President and chaired by the Secretary of the Treasury, Donald T. Regan.

At this time, when the Task Force is nearing the completion of its work, we reiterate our concern that the Working Group itself and the US Administration in formulating proposals for action on its recommendations should give full weight to the combined views of the United States' main trading partners so that an internationally-agreed solution to this growing problem

may be implemented quickly thereafter. The achievement of this objective would represent the removal of a serious obstacle to the further development of our trade and investment relationships.

The below-mentioned diplomatic representatives take this opportunity to renew to the Department of State the assurances of their highest consideration.

I append my signature in support of the Joint Note on Unitary Taxation submitted by the Embassy of Belgium.

/s/Ambassador, E and P
British Embassy

Date: 25 January 1984

STATEMENT OF THE GOVERNMENT OF THE UNITED KINGDOM BEFORE THE UNITED STATES TREASURY WORKING GROUP ON WORLDWIDE UNITARY TAXATION

SUMMARY OF PRINCIPAL POINTS

A. Her Majesty's Government is opposed to the application of the unitary method of state taxation on a worldwide reporting basis.

B. The worldwide unitary method of state taxation is contrary to well established international principles and practice of taxation, and imposes unreasonable tax and administrative burdens on multinational corporate groups doing business throughout the world.

C. Unitary taxation is already damaging commercial and economic relations between the US and the UK and other countries. If it continues, the damage to international trading relations will become more serious. If unitary taxation spreads, the scale of the worldwide damage will be further increased.

D. In particular for UK companies unitary tax imposes significant additional burdens on both the companies and their shareholders. First it produces anomalous tax liabilities, which may be considerably larger than those calculated on the internationally-accepted arm's length basis. Second the requirements of the method involve additional compliance costs. In addition the uncertainty generated by the unitary method has disruptive effects on UK corporations' business activities and industrial investment.

E. As long as the worldwide unitary method persists, it will be impossible to achieve the essential economic objectives of providing a consistent and coherent tax framework for international trade and investment.

Moreover, the damage to international trade and investment would be greatly increased if foreign Governments responded by imposing retaliatory measures or introducing unitary systems of their own.

I. INTRODUCTION

1. Almost two years ago, the United States Government advised the Supreme Court in its brief in the *Chicago Bridge & Iron Co* case, that "the imposition of [a state tax] on the apportioned combined worldwide business income of a unitary group of related corporations impairs federal uniformity in an area where such uniformity is essential". That explicit pronouncement of United States policy is equally appropriate for today. Indeed, since that brief was filed, the threat to international business relations posed by the worldwide unitary method of state taxation has assumed even greater magnitude. At present 11 states employ the worldwide combined reporting system, namely Florida, California, Massachusetts, Oregon, Alaska, Idaho, Colorado, Montana, New Mexico, North Dakota and Utah. Approximately 70 per cent of the direct foreign investment in the United States comes from Western Europe. Hence, the burden of the unitary worldwide combined reporting system falls particularly heavily on European based corporations.

2. It is therefore hardly surprising that the unitary tax issue has been the subject of repeated diplomatic protests from other governments since 1979. On August 1, 1983, the 10 governments of the European Community delivered a diplomatic note to the United States Government renewing their objections to the international application of the unitary

tax. Similar objections were expressed by the Japanese Government on August 11, the Netherlands Government on August 17, and the Canadian Government on August 23. Earlier protests against unitary taxation by these governments have been well publicised.

3. The United Kingdom has an interest even stronger than that of other Governments since United Kingdom direct investment in the United States is greater than that of any other country. By 1982 the cumulative total of United Kingdom investment in the United States was $23.334 billion which accounted for 23% of the foreign direct investment in the United States. Any measure which inhibits investment by British business in the United States is clearly to the detriment of both countries. Her Majesty's Government believes that unitary taxation already has a damaging effect on the business relations between the two countries and that the damage will become very serious if the issue is not speedily resolved.

4. The unitary method of taxation is wholly contrary to the agreed international method of attributing the profits of multi-national enterprises between the countries in which they operate. This is the arms-length method which seeks to ensure that profits of such enterprises are allocated in such a manner that each country is able to claim tax on the profits—and no more and no less than the profits—actually earned in that country. If all countries use the same arms-length basis in determining the profits, then double taxation should be avoided through the international net-work of double taxation agreements.

5. Unitary taxation is incompatible with this internationally agreed method. It uses a formula to determine what sum shall be charged and, as practised in the States, it may include profits brought into charge elsewhere on the arms-length basis. If unitary taxation were practised worldwide and every national state could use an identical formula for determining its share of the profits of a multinational enterprise then agreement might be reached internationally on such a basis which would eliminate double taxation. It is, however, the case that over the last 40 years or more the international community has devised and refined the arms-length method for international use. It is in this context of worldwide agreement about the method of attributing profits to multinational companies that the use of a different method by some states of the United States causes a distortion which makes it internationally unacceptable.

6. It is for these reasons that Her Majesty's Government has consistently urged that action be taken to prevent the application of unitary taxation to United Kingdom businesses. It sought to do so when negotiating the current United Kingdom/United States Double Taxation Agreement: but when in 1979, the United States Senate ratified the Treaty it attached a reservation against this provision in Article 9 (4). That Article in its original form would have prevented the United States Government and the individual states from applying the unitary method to United Kingdom corporate groups which have subsidiary companies in the United States. In its final form, the Article applied only for purposes of the United States Federal tax, which does not em-

ploy the unitary method. At the time the United Kingdom, with the approval of Parliament, ratified the amended Treaty and accepted the Senate reservation against Article 9 (4), Her Majesty's Government was given to understand that the Government of the United States would use its best endeavours to eliminate the application of the unitary method of taxation on a worldwide basis. Nevertheless, since then more states have adopted the worldwide unitary approach.

7. Attempts have been made concurrently to secure a solution through the United States courts without success. Last June the United States Supreme Court ruled in *Container Corporation* v. *Franchise Tax Board*, that the California worldwide unitary tax method did not violate the Foreign Commerce Clause of the United States Constitution as applied to a United States parent corporation and its foreign subsidiaries. In so holding, the Court specifically reserved the question of the constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries.

8. In Her Majesty's Government view, the Court's decision in *Container Corporation* was an unfortunate setback that derived, in large measure, from the confusion caused by the failure of the United States Government to reaffirm the position taken in its original brief in the *Chicago Bridge* case, to which we have referred. In considering whether the California tax impaired federal uniformity and the conduct of United States foreign relations, the Court observed that the federal government's failure to file an ami-

cus brief in the *Container* case suggested that "the foreign policy of the United States is not seriously threatened by California's decision to apply the unitary business concept and formula apportionment. . . ." Hence, Her Majesty's Government believes that the outcome of the Court's sharply divided (5-3) decision could well have been different had the federal government clearly restated what all parties originally understood to be its position.

9. Moreover, the likelihood of an early resolution of the applicability of the unitary method to the foreign parent corporation case reserved by the Supreme Court is very much in doubt. Attempts are being made to have the matter heard but two courts of appeal have dismissed suits by foreign corporations against the California Franchise Tax Board on the ground that those foreign entities lack "standing" to contest the tax assessments that are nominally addressed to their domestic subsidiaries. On the other hand, as domestic corporations, the subsidiaries cannot invoke the treaty provisions that are at the heart of the claim that the unitary method impairs the conduct of foreign relations. Hence, these court rulings render rights conferred by treaties unenforceable by the very entities those provisions were negotiated to protect-companies of one treaty party engaged in this way in the territory of the other treaty party.

10. The denial of standing to raise claims under the United States Constitution will leave foreign parent companies which in fact bear the economic burden of double taxation caused by the unitary method unable to challenge the lawfulness of that burden. This may not be "taxation without representation" as it is

usually understood. But it does amount to taxation without the right to be heard, in that a levy whose constitutionality is at issue cannot be challenged by a party directly affected by it. Reciprocally narrow rulings by foreign courts would weaken the ability of the United States companies to obtain judicial protection for their investments abroad.

11. In sum, the failure of both the treaty making process and federal litigation to resolve the validity of the worldwide unitary method makes it imperative that a comprehensive solution be reached as soon as practicable. It is Her Majesty's Government's view that this method is incompatible with the internationally accepted regime for taxing the profits of multinational enterprises.

II. CRITERIA FOR JUDGING A TAX SYSTEM

12. Any tax system should be judged on whether it is capable of being administered equitably, produces certainty and efficiency, and whether it is capable of simple operation. The effects of applying unitary tax on a worldwide basis are both *inequitable* and *uncertain*. Moreover it is *far from simple* for the companies concerned, since it requires a restatement in US terms of the income and formula factors for each component part of a group operating worldwide. These effects in turn constitute an element of *tax induced inefficiency* in the world economy, which will inevitably distort trade patterns and inhibit business decisions.

Application to differing economic circumstances

13. These adverse effects can be traced to particular aspects of applying the unitary basis to the condi-

tions and circumstances which exist today. First, when applied on a worldwide basis, the unitary system is of necessity operating in economic conditions which are far from homogeneous. The system works by combining the income of several related corporations engaged in a "unitary" business. Income is then allocated to the taxing state by multiplying the total income of the enterprise by a percentage comprised of the average of the ratios of instate property, payroll and sales to total property, payroll and sales. The precise formula varies from one State to another.

14. The theory underlying this "unitary" approach is that a dollar of payroll or property spent or a dollar of sales made in one tax jurisdiction produces roughly the same amount of taxable income as a dollar so spent or sales made in another tax jurisdiction. This theory manifestly falls down when applied to two (or more) countries whose economic circumstances are very different. For example, in a developing country property and payroll costs may be very low, relative to those in the United States. On the other hand profits will probably be higher to reflect the risks of expropriation, currency exchange limitations, or other factors. Applying the unitary basis to a group operating both in the USA and a developing country will thus result in a reallocation of group's income from the developing country to the USA. Quite apart from the implications for the group itself (which are discussed in more detail below), it must be open to question whether this represents an equitable division of world resources.

Incompatibility with arm's length basis

15. Second, because international trade relations operate on an entirely different (ie arm's length) basis, the worldwide application of the unitary system produces results which are at best anomalous and at worst give rise to serious inequities. In sharp contrast to the unitary method (see above), the arm's length method requires the income of each corporation to be computed on a separate accounting basis under the assumption that each member of a corporate group must deal with the other members as if they were wholly separate entities owned by unrelated interests. This method has now been recommended by both the OECD and UN model treaty and enshrined in a worldwide network of bilateral treaties to prevent double taxation, including those treaties to which the USA is a party. In addition, following the lead given by the US Federal Authorities in 1928, virtually all developed countries have now adopted the arm's length standard for preventing tax avoidance through artificially fixed intercompany prices.

16. The unitary method and the arm's length method are not compatible. Applying the unitary formula to groups which also operate in countries which work on the arm's length basis leads to cases of double taxation. It has been argued that the unitary basis does not in fact tax the foreign source income of foreign corporations related to the "unitary" company. Instead that income is merely taken into account in order to determine the net income attributable to activity within the "unitary" state. But the arithmetical results of applying a unitary formula belie

this argument. The "unitary" state is in effect requiring a consolidated income tax return and subjecting to tax the income earned by foreign members of the unitary group without giving any relief for overseas tax. In other words it has extended its jurisdiction to bring into its tax net income over which other states will have exercised their priority taxing rights under the normal arm's length arrangements.

17. The element of double counting this involves can and does lead to multinational groups being taxed on more than 100 per cent of their income. This may represent an additional financial cost for the group itself, which is inequitable. Or it could lead to a diminution of the revenues flowing to any exchequer which seeks to avoid double taxation by giving credit for the "unitary" tax paid—a result which at best can be described as anomalous. These inequities and anomalies are particularly acute in the—not uncommon case—where the US company of a unitary group operates at a loss. Even though it had made no profit by any normal commercial standards, the US company would be liable for tax in respect of a proportion of the worldwide profits of its foreign affiliates. In other words there would be an element of direct subsidy from the worldwide group (or foreign revenue as the case may be) to the unitary state.

Unitary basis is not uniform

18. Third the unitary basis is not—and cannot be—uniform in its application. The very concepts it uses are incapable of precise definition, at least on anything other than a very local basis. It is notable that, even amongst the various states within the USA, there are significant variations first in the criteria

used for determining whether or not a particular corporation is "unitary", and second in the formula to be applied to unitary corporations. Even within an individual state it is by no means unknown for a business which has been deemed "unitary" one year to be classed as non-unitary the following year, and for the basis of calculating its tax liability to vary from one year to the next. As a result no business can be sure whether or not it will be adjudged to be "unitary" and if so, how its tax bill will be calculated. In other words the unitary basis breeds uncertainty. The problem this creates for business is heightened by the lack of any procedure analogous to that embodied in "arm's length" tax treaties for resolving disputes about the application of the rules to individual cases.

Unitary basis imposes high compliance costs

19. The fourth aspect of the unitary basis which contributes towards its damaging effects is the compliance costs it involves. It is for the companies themselves to tell the Working Group what complying with the unitary system means in practice. The UK Government would merely note that the full requirements of the system necessitate, at a minimum, the translation into US dollars of accounts maintained by related companies in a multitude of different currencies and the preparation of extra sets of accounts to meet the specific, and varying, requirements of the unitary states. And we understand that the details requested often reflect confidential data, trade secrets, or other information that cannot be made available for reasons totally unrelated to tax considerations.

20. Of more direct concern to the UK Government is the extent to which the unitary states' demands for financial information may involve investigation of the records of UK companies which are outside the USA. More often than not, the substantial majority of the records required describe business transactions that are entirely unrelated to activities within the United States. This is objectionable in principle, as well as producing excessive compliance burdens in practice.

Comparison of unitary method with arm's length method

21. By contrast, the arm's length method, though not perfect, avoids these four very real problems which inevitably arise when the unitary basis is applied worldwide. First by focussing on the amount of profit that would have been made within an individual country by independent parties dealing at arm's length, it recognises that companies operating in different economic circumstances will incur different costs and run very different risks. Second, there is of course no question of the basis being incompatible with internationally-accepted methods—the arm's length basis *is* the international accepted method. Equally, the 'international' nature of the arm's length method helps to avoid the third problem—the lack of any uniform rules. Because it has been for so long the guiding principle of international tax, there has been time to smooth out the 'rough edges' of the arms-length method. The countries of the world have evolved a series of internationally accepted standards which are capable of exact definition under clearly applied procedures. So the various problems identified earlier—of double taxation: of companies being liable to tax on more than 100 per cent of their

income: of companies being liable to tax in respect of profits when, on normal commercial principles, they are making a loss—simply do not arise or where they do, they can be satisfactorily resolved.

22. The fourth problem, that of high compliance costs for companies, equally does not arise to anywhere near the same extent under the arm's length method. The information required in order to operate this method is, more often than not, information which companies have already had to prepare for other purposes. The use of accounts drawn up to comply with company law requirements is a good example of this.

23. Generally, therefore, when measured against the criteria for judging a tax basis the arm's length basis is on each count preferable to the worldwide unitary method. It is at once more equitable, more certain, simpler and more conducive to efficiency. Nor does there seem any good reason why it should not serve as an effective policing mechanism to protect the revenue of individual states. There is an extensive body of Treasury Regulations under Section 482 of the Internal Revenue Code of 1954 providing definitive guidelines governing the fiscal relationships of commonly-controlled corporations. Moreover we understand that, under long-standing accords, information gathered by the United States Treasury from Federal tax audits is continually made available to the individual States. Against this background, the majority of States have felt able to operate an arm's length system, and to apply this rule to subsidiaries of multinational group resident within their jurisdictions.

Wider consequences of the unitary system

24. Any set of rules which fails to measure up to the criteria of a good tax system must be expected to have adverse consequences which go well beyond the immediate impact of that set of rules itself. This is certainly the case with the current application, by several US States, of the unitary system on a worldwide basis.

25. First there is now evidence that it is inhibiting trade relations and distorting investment patterns. In the light of the inequities, anomalies and uncertainties generated by the tax rules, foreign corporations are re-appraising the benefits and burdens of conducting business within a unitary state. The recent decision by the London Chamber of Commerce to cancel its mission to Florida on account of Florida's adoption of the worldwide unitary basis is a good example of this.

26. Furthermore, the spread of unitary taxation amongst the various States can only serve to undermine the very strong position that the United States has adopted in OECD and elsewhere for the liberalisation of international investment flows. The position was restated only a few weeks ago by President Reagan himself in his 9 September Statement on US policy towards international investment. The continued imposition of unitary taxation is incompatible with this stance.

27. These adverse consequences for worldwide trade and investment would be even worse if other countries respond to the States' application of unitary tax by taking retaliatory measures or introducing unitary systems of their own. In particular the States' operation of the worldwide unitary basis, and the US

Federal Government's failure to prohibit this system, may well serve as an example which other countries will soon choose to follow. In particular some developing countries may feel that the system has its attractions for them. If such countries adopt unitary tax, they would be unlikely to follow the three factor formula used, for example, in California. The very different economic conditions which prevail in the developing world would naturally incline them to develop or emphasise factors which allocate a greater proportion of income to the developing country. They might for example focus simply on sales.

28. The effects of other countries taking retaliatory measures, or unitary tax spreading outside the United States, will be keenly felt by the United Kingdom. This is because the UK invests on a substantial scale in foreign countries in both the developed and developing world. But if the UK is a substantial investor in foreign countries, the United States is a much larger one. So the adverse impact on the United States must be expected to be much greater. As things stand at present the economic burden this imposes will, in large part, fall on the United States Federal Government. Because the United State's Internal Revenue Code allows a credit against United States taxes for taxes paid to a foreign country (subject to certain limitations), any increase in foreign taxes could be offset dollar for dollar by a reduction in United States taxes.

III. CONCLUSION

29. In this paper the UK Government has analysed the worldwide unitary system by reference to the universally-accepted criteria of a good tax system—equity, certainty, simplicity and the promotion of economic efficiency. It has demonstrated that, when applied in the present international context, the worldwide unitary method inevitably produces results which are inequitable and uncertain. The method involves additional compliance costs for companies. Furthermore it is in the United Kingdom Government's view objectionable in principle that the method can require the disclosure of the records of companies outside the USA, particularly as these will often apply to transactions entirely unrelated to activities within the United States.

30. If the worldwide unitary system is allowed to persist it will hamper rather than promote economic efficiency distorting investment patterns and inhibiting trade throughout the world. It makes it impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment. This framework is particularly crucial at the present juncture in the development of the world economy, when businesses are seeking profits throughout the world without regard to national boundaries. The narrow economic standpoint of the unitary system is incompatible with the harmonious relationship that is the goal of our governments, to the benefit of the American and British people alike.

LETTER DATED JULY 12, 1983 FROM THE CHANCELLOR OF THE EXCHEQUER TO THE SECRETARY OF THE TREASURY

Dear Mr. Regan,

I am writing to you on the subject of unitary taxation following the recent decision of the United States Supreme Court in the case of Container Corporation of America v. The California Franchise Tax Board, upholding the right of a state to use the worldwide combined unitary method of taxation. This method carries a high risk of double taxation, and imposes on international companies a heavy administrative burden. As you know this is a subject on which my predecessor and other colleagues have expressed strong views to you on a number of occasions. It is an issue of considerable concern to Parliament and the British business community.

After the filing of an amicus curiae brief in the Chicago Bridge and Iron case by the United States Solicitor General, we advised British companies to await the Supreme Court's decision before making further representations. We were therefore naturally disappointed with the ruling in the Container case. When these issues do arise it seems to us important that an amicus curiae brief is filed, and I wonder whether the lack of such a brief might have been a factor in this case. I appreciate that the latest decision does not apply to United States corporations with foreign parents, which is the issue of most concern to us. However the consequence seems to be that there is little prospect of this particular issue being tested in the Supreme Court in the near future.

I understand that at your meeting on 7 July with the British Ambassador you said that you would probably consider legislative action as a result of the decision. In

the circumstances I would welcome this. Following the reservation of the United States Senate on Article 9(4) of the Double Taxation Convention, there were as you know, some misgivings here, when the Convention came before Parliament for ratification in 1980. Nonetheless ratification was approved in the expectation that action by the Administration to eliminate the practice was in hand.

I should be interested to know how you see this developing, and to learn of your proposed timetable. You will of course be aware that this is a matter where there is strong pressure in Parliament. We are keen for the matter to be resolved as soon as possible before possible harm is done to the good relations between our two countries. I hope we shall have an opportunity to let you have our views on any legislation you may be preparing. Geoffrey Howe, who of course also has a close interest in this subject, will see you in Washington this week and looks forward to having further discussions on this with you.

Yours sincerely,

Nigel Lawson

NOTE SUBMITTED BY THE UNITED KINGDOM TO THE DEPARTMENT OF STATE DATED MAY 18, 1982

Note No. 83

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honour to refer to their Note of 25 March 1980 to the Department on the exchange of Instruments of Ratification of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains.

Her Majesty's Government remains firmly convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is entirely unsatisfactory. As was pointed out in that Note this system of taxation makes no attempt to examine the profits made by the locally based subsidiary company. It may look to the total profit of the worldwide operations of the group and claim a proportion of that total by reference to arbitrarily defined criteria. It can lead to a demand for tax by reference to group profits from unconnected activities in other parts of the world where they are already taxed, even though the local subsidiary is incurring substantial losses. In addition the compliance costs are unacceptably high.

Her Majesty's Government wishes to draw the attention of the State Department to the case of Shell Petroleum N.V. v. Graves et al. listed for hearing before the United States District Court, Northern District of California on 1 June 1982, a case which amply illustrates these and other arbitrary and damaging features resulting from

the international application of the unitary basis of taxation with worldwide combined reporting.

Unless common rules accepted by all OECD member States for determining the allocation of profits between different taxing jurisdictions are followed internationally it will be impossible to preserve the essential objective of providing a consistent and coherent international tax framework for business and investment. Her Majesty's Government therefore urges as a matter of high priority that the Government of the United States should use its best endeavours to eliminate the international application of the unitary basis of taxation.

The British Embassy avail themselves of this opportunity to renew to the Department of State the assurances of their highest consideration.

18 May 1982

BRITISH EMBASSY

WASHINGTON

NOTE SUBMITTED BY THE UNITED KINGDOM TO THE DEPARTMENT OF STATE DATED OCTOBER 30, 1981

Note No. 211

Her Britannic Majesty's Embassy present their compliments to the Department of State and, on behalf of the Ten EEC Governments, of which the British Government has now the Presidency, have the honour to forward the attached Note on the problems of the unitary method of taxation.

The British Embassy avail themselves of this opportunity to renew to the Department of State the assurances of their highest consideration.

30 October 1981

BRITISH EMBASSY

WASHINGTON

Attached: Note.

UNITARY TAXATION

1. Our Governments are concerned about the application to US subsidiaries of foreign companies of the unitary basis of taxation as applied in California and in varying degrees by certain other States.

2. The unitary basis makes no attempt to examine the profits generated by the subsidiary. It looks to the total profits of the worldwide operations of the group of which the subsidiary is a part, and claims a portion of those profits on the basis of the assumption that certain specified factors, such as the fixed asset values, turnover and payroll, affect the profits of the subsidiary in the same way and to the same

extent as the profits of the group as a whole, irrespective of where the corporations of the group operate. This means that, whenever the group as a whole makes a profit the subsidiary will be taxed on a portion of this profit, even if the subsidiary is actually making a loss, or in the reverse situation, that the subsidiary may not be taxed if the group as a whole has made a loss, although the subsidiary is actually in a profit making position.

3. This method is incompatible with the principles accepted by all OECD member states and recommended to all states as a basis for the taxation of subsidiaries or permanent establishments of foreign enterprises. These principles require that a subsidiary should be taxed only on the profits it actually has made, provided that these are based on dealing at "arm's length" between the subsidiary and related enterprises, i.e. that the transactions between the subsidiary and related corporations are on the same or on a comparable basis as transactions between wholly independent parties. This is intended to arrive at a fair measure of profit and rule out artificial pricing between members of the group for the sole purpose of minimizing tax liability.

4. Unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

5. The unitary tax basis can give rise to obviously inequitable tax liabilities, and to a form of double taxation which often cannot be relieved, or can be

relieved only if countries, which follow generally accepted practices, bear an unfair burden of relief.

6. Unitary taxation, because it requires worldwide reporting of the group's activities in the state where the subsidiary operates, imposes very heavy compliance costs, in addition to the costs of compliance and reporting for non-US corporations in their "home countries."

7. The Federal Government uses the arms-length basis for its taxation of subsidiaries of foreign corporations.

8. The problem was addressed in the US/UK Double Taxation Treaty. Article 9(4) of the Treaty, which was supported by the Administration, would have disallowed the imposition of unitary taxes on subsidiaries of UK companies. When the Senate voted on the Treaty in 1978 the majority approved the Treaty with Article 9(4) in its original form, although the necessary two-thirds majority was not achieved. Subsequently, the Senate approved the Treaty with the necessary two-thirds majority, but subject to the reservation that Article 9(4) was not to apply for the purpose of state taxation. Article 9(4) remained in the Treaty, but only for the purpose of national taxation.

9. There are currently two relevant bills in Congress, S655 and HR 1983.

10. In view of the strong arguments against unitary taxation and the recent extension [of] its application in New York State, our Governments urge you to support this legislation in so far as it relates to the unitary tax issues raised above, with a view to early enactment.

NOTE SUBMITTED BY THE UNITED KINGDOM TO THE DEPARTMENT OF STATE DATED MARCH 25, 1980

Note No. 51

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honour to refer to the discussions between representatives of the two Governments about the convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, signed at London on 31 December 1975, as amended by protocols signed at London on 26 August 1976, 31 March 1977 and 15 March 1979 (hereinafter referred to as "the Convention"). It is a matter of regret to her Majesty's Government that difficulties over one aspect of the Convention, although it is an important one, should have tended to obscure the achievement of the two Governments in reaching a fair and balanced agreement.

2. Among double taxation treaties, that between the British and United States Governments has a pre-eminent position. The economic and financial links between the two nations are so strong and the areas covered so diverse that, apart from its intrinsic importance to the United Kingdom and the United States of America, the Convention attracts wide interest internationally and is a source of authority in its field.

3. Her Majesty's Government is therefore gravely concerned that as a result of the amendment resulting from the United States Senate reservation on Article 9(4) the Convention does not comprehensively restrict the application of the unitary basis of taxation. That Article in its

original form would have prevented the United States Government and the individual States of the United States of America from applying this basis to United Kingdom corporate groups which have subsidiary companies in the United States. In its final form the Article applies only for the purposes of United States federal tax, where the unitary basis is not employed, and does not cover individual States of the Union. This is not only a set-back for British corporate investment in the United States. It may also be interpreted as awarding some approval for the unitary basis of taxation and could have wider repercussions.

4. Her Majesty's Government is convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is entirely unsatisfactory. The Organisation for Economic Co-operation and Development has explored, encouraged and developed the "arm's-length" principle for regulating the taxation of multinational enterprises operating through subsidiary companies or branches. This principle requires that the subsidiary or branch should be taxed only by reference to the profits which its own activities generate. Where these activities involve transactions with related enterprises and these transactions are not on the basis which would be made between wholly independent enterprises, the profits are to be adjusted for tax purposes by reference to the independent enterprise test ie the "arm's-length" basis. This is intended to achieve a fair measure of the profit by cancelling the effect of any artificial pricing between related enterprises. The "arm's-length" approach has been internationally accepted and is a vital feature of double taxation conventions throughout the world.

5. The unitary basis with combined reporting is a quite

different approach. It makes no attempt to examine the profits made by the locally based subsidiary company. It may look to the total profit of the world-wide operations of the group and claim a proportion of that total by reference to arbitrarily defined criteria. The problems associated with this technique are many and have been well rehearsed. The tax consequences are unpredictable and arbitrary. The widely varying commercial and economic climates in different countries produce inequitable results. Under this system it can lead to a demand for tax by [countries] in other parts of the world where they are already taxed, even although the local subsidiary is incurring substantial losses. On the unitary basis there is likely to be unrelieved and unrelievable double taxation. In addition the compliance costs are unacceptably high.

6. Apart from these inherent problems associated with the unitary tax basis, its incompatibility with the internationally accepted "arm's-length" basis would generate conflicts between the international investing and trading nations and disruption of international business if the precedent implicit in the Convention were to be followed by other countries. Unless common rules for determining the allocation of profits between different taxing jurisdictions are followed internationally it will be impossible to preserve the essential objective of providing a consistent and coherent international tax framework for business and investment, for which the United States and the United Kingdom have striven together with their fellow members of the Organisation for Economic Co-operation and Development. It is the view of Her Majesty's Government that the unitary basis, which is not a practical international alternative to the "arm's-length" basis, could undo the important and patient international work that has been achieved in

regulating international tax practices, and that every effort is required to discourage the use of the extension of that basis. It is to this end that the British and United States Governments have expressly prohibited its use for the purpose of the respective national tax systems under Article 9(4); and the issue will be an important aspect of the proposed annual review of the Convention.

7. Her Majesty's Government has recognised, in ratifying this Convention with the approval of the United Kingdom Parliament, and in its acceptance of the United States Senate reservation against Article 9(4) of the Convention, the difficult issues raised within the United States in seeking to limit State taxing powers through the double taxation conventions of the United States. It has also recognised the importance of the Convention in its many other aspects for the two Governments and for the business and investment communities on each side. It must be emphasized however that the acceptance of the Senate reservation in no way implies approval of the unitary basis and it is the urgent request of Her Majesty's Government for the reasons given in this Note that the Government of the United States should use its best endeavours to eliminate the international application of the unitary basis of taxation.

8. The British Embassy avail themselves of this opportunity to renew to the Department of State the assurances of their highest consideration.

British Embassy
WASHINGTON 25 March 1980

SUBMISSION DATED DECEMBER 23, 1983 FROM THE CONFEDERATION OF BRITISH INDUSTRY TO THE UNITED STATES WORKING GROUP ON WORLDWIDE UNITARY TAXATION

* * *

10 *THE COMPLIANCE BURDEN*

No Uniform Rules

10.1 The unitary States require foreign data to be converted or adjusted to the unitary State basis. Unfortunately the unitary States at present have no common rules as to how such conversion shall be done since there is no uniformity of underlying tax rules and presumably never will be so long as fiscs seek to maintain their individuality.

Disproportionate Burden on Foreign Groups

10.2 Foreign audited accounts may have to be converted into a US or local State acceptable form. Not only is this time consuming and expensive but from a businessman's point of view it becomes an exercise verging on the ridiculous if different sets of figures have to be produced to meet the whims of each local fisc.

10.3 For example, assume that UK corporation X transacts business in 20 different countries through separate subsidiaries. Clearly, these 21 corporations, including the UK parent, would not keep their books, or determine income, payroll, plant costs, and sales in United States dollars. In addition, each corporation would maintain, in local language, books and records which are consistent with the accounting standards required by its country of residence.

10.4 If X now establishes a subsidiary in a unitary jurisdiction it must be prepared to (1) translate 21 languages and (2) translate 21 currencies into United States dollars at scores of different exchange rates, all of which are subject to sharp fluctuations, devaluations, and other changes, and (3) determine what method of accounting is acceptable in the unitary jurisdiction and restate 21 sets of accounts to be consistent with that method of accounting. These adjustments could run the gamut from differences in depreciation methods to changes in tax years. Assume that the subsidiary transacts business in two different unitary jurisdictions which utilise different accounting standards. Corporation X must now prepare 42 separate sets of accounts from 21 countries. This is a situation where the cost of compliance would frequently exceed the tax at stake.

10.5 This is not a merely theoretical objection. The problem has already been acknowledged to exist, as an extract from the British Tax Review 1983, pages 206 and 207 makes clear:

> "A frank statement of one of the problems encountered in unitary taxation of foreign-based groups is contained in a memorandum dated May 31, 1979, from Dennis G Amundson, Deputy Director of the Department of Economic and Business Development of the State of California to Richard T Silberman:
>
> > "they (the staff of the Franchise Tax Board) readily acknowledged that the Board has not been able to develop an equitable method of converting foreign-based earnings into Amer-

ican dollars. This problem is greatly compounded when the foreign firm conducts operations in several countries. The distortive effect of foreign currency translation is very dramatically pointed out by Lever Brothers, a subsidiary of Unilever, N.V., a Dutch corporation, which shares a common Board of Directors with Unilever Ltd, a British corporation. In the 1976 tax year, Lever Brothers' tax obligation to the State of California . . . depends entirely on the method used to convert Dutch guilders and British pounds to American dollars and the exchange rate at the time the calculations are made. In this case, the guilder, which is very strong in relation to both the pound and the dollar, produces a substantially different picture of Lever Brothers' profitability than calculations based on the weaker pound. The staff of the Franchise Tax Board concedes that they have no existing method to deal with this problem on a uniform basis, and thus is forced to negotiate tax assessment on a case by case basis. . . ." "

10.6 We note with concern that even for one item, the translation of foreign currency, there is no common rule.

Foreign Information May not Exist or may be Secret

10.7 The situation would be difficult enough if the books and records could be produced. However, the relevant financial information may not exist at all or may reflect confidential data, trade secrets, or other information that cannot be made available for reasons totally unrelated to tax considerations.

There is no guarantee that such information will continue to be available if foreign fiscs perceive that they, and taxpayers domesticated in their jurisdiction, are being penalized by imposition of worldwide combined reporting in the USA. A company may very well be compelled to agree to any tax audit adjustment, regardless of its merit, either because the cost of contesting the adjustment is prohibitively high, or because the relevant financial information cannot readily be made available. Moreover, the cases demonstrate that the unitary state may seek to exact additional penalties for failure to provide the requested books and records.

Potential Cost of Compliance—Multiple Jurisdictions

10.8 It is already burdensome enough that information has to be kept locally according to local rules and converted as best possible for headquarters purposes. To extend this whole conversion process not just upwards towards the ultimate parent company but in all other directions also, assuming the fiscs involved in local operations jumped on the unitary bandwagon, seems patently absurd from a realistic commercial angle.

* * *

Office-Supreme Court, U.S.
FILED
NOV 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EMI LIMITED,

Petitioner,

v.

WILLIAM BENNETT, AND ERNEST J. DRONENBURG, JR., SUCCESSOR; KENNETH CORY; RICHARD SILBERMAN, AND MARY ANN GRAVES, SUCCESSOR; AND MARTIN HUFF AND GERALD H. GOLDBERG, SUCCESSOR,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ORGANIZATION FOR FAIR TAXATION OF INTERNATIONAL INVESTMENTS, INC. AS *AMICUS CURIAE* SUPPORTING CERTIORARI

JAMES M. CARTER
(Counsel of Record)
ICI AMERICAS INC.
Wilmington, DE 19897
(302) 575-3738

LAWRENCE A. SALIBRA
ALCAN ALUMINUM CORP.
100 Erieview Plaza
P.O. Box 6977
Cleveland, OH 44101
Counsel for Amicus Curiae

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

22 pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT:

PETITIONER, A FOREIGN CORPORATION THAT DOES NOT DO BUSINESS IN THE UNITED STATES, ALLEGES AN INDEPENDENT INJURY TO ITSELF AND TO UNITED STATES FOREIGN COMMERCE BY REASON OF CALIFORNIA'S UNITARY TAX SCHEME. THIS STATES A CASE ARISING UNDER THE CONSTITUTION AND SHOULD CONFER STANDING TO SUE IN UNITED STATES COURTS 4

A. Petitioner And Others Similarly Situated Suffer Independent Injuries To Themselves Under California's Unitary Tax Scheme 4

B. Petitioner's Claims State A Case Or Controversy Arising Under The United States Constitution That Should Confer Standing To Sue In United States Courts 8

C. This Court Already Held That State Taxation Of Instrumentalities Of Foreign Commerce Creates Impermissible Burdens And Interfers With Federal Constitutional Powers. Those Decisions At Least Confer Standing Upon Petitioner To Sue In United States Courts To Vindicate Its Constitutional Claims 12

D. Proof Of Impermissible Burden On Foreign Commerce Forbidden In *Japan Line* Is Most Appropriately Presented by Foreign Parents 13

1. Double Taxation 15

2. Federal Uniformity 15

CONCLUSION 16

APPENDIX A: List Of OFTII Members 1a

TABLE OF AUTHORITIES

CASES: Page

Alcan Aluminium v. *Department of Rev. of State of Or.*, 724 F.2d 1294 (7th Cir. 1984) 5, 6

Capitol Industries-EMI, Inc. v. *Bennett*, 681 F.2d 1107 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982) 7

Chicago Bridge & Iron Co. v. *Caterpillar Tractor Co., Illinois Dept. of Rev. et al*, ___ U.S. ___, No. 81-349 9, 10

Container Corp. v. *Franchise Tax Bd.*, 463 U.S. 159, 77 L.Ed.2d 545 (1983) 8, 9, 10, 11, 12

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) 8, 12, 13, 14, 15

Mobil Oil Corp. v. *Commissioner*, 445 U.S. 425 (1980) . 11

CONSTITUTION:

Foreign Commerce Clause, Art. I, Sec. 8, cl. 3 ..... 2, 5, 7, 8, 14, 17

STATUTES:

INTERNAL REVENUE, CODE, § 482 11

INTERNAL REVENUE, CODE, § 861 11

CALIFORNIA REV. & TAX CODE, § 25101 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-613

EMI LIMITED,

Petitioner,

v.

WILLIAM BENNETT, AND ERNEST J. DRONENBURG, JR., SUCCESSOR; KENNETH CORY; RICHARD SILBERMAN, AND MARY ANN GRAVES, SUCCESSOR; AND MARTIN HUFF AND GERALD H. GOLDBERG, SUCCESSOR,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ORGANIZATION FOR FAIR TAXATION OF INTERNATIONAL INVESTMENTS, INC. AS *AMICUS CURIAE* SUPPORTING CERTIORARI[1]

INTEREST OF *AMICUS CURIAE*

The Organization for Fair Taxation of International Investments, Inc. ("OFTII"), is a Delaware nonprofit corporation with membership comprised of domestic subsidiaries of foreign corporations that do not do business directly and do not maintain permanent establishments in

[1] Petitioner and respondent have filed letters with the Clerk of this Court consenting to the filing of this *amicus curiae* brief.

the United States. The purpose for which OFTII was organized is to represent its members' interests in matters of State taxation and to seek legislative and judicial solutions to problems of double taxation and tax burdens on foreign commerce. OFTII members include the corporations listed in Appendix 1, *infra*. These corporations are treated as unitary businesses with their foreign parents and have their foreign parents' foreign incomes included in the domestic corporations' apportionable California income tax bases.

The fundamentally important issue before the Court on this petition is whether a foreign parent whose foreign income is combined with that of its domestic subsidiary to create a base upon which a State apportions income tax has, itself, standing to challenge the constitutionality under the Foreign Commerce Clause of the inclusion of such foreign parent's income in the State's apportionment formula.

OFTII, on behalf of its members, has a direct interest in having this Court address the issue of the standing of a foreign parent with respect to foreign commerce because, in the event a foreign parent has no standing, the entire burden of demonstrating that the unitary tax unconstitutionally burdens foreign commerce will fall on the members of OFTII: domestic subsidiaries that conduct little or no business in foreign commerce and that have no direct knowledge as to the income of the foreign parent beyond what they themselves generate.

SUMMARY OF ARGUMENT

Petitioner (EMI), a foreign corporation that does not do business in the United States, has alleged three grounds of injury: (1) Burden and expense of compliance; (2) risk of violating English law in making disclosure of

information required in computing California's worldwide income tax; and (3) loss in value of petitioner's investment in its United States subsidiary against which the worldwide assessment is exigible. OFTII, as *amicus*, takes no position with respect to the alleged violation of English law (British Official Secrets Act) or the merits of petitioner's case, but does urge this Court to direct the lower United States court to hear petitioner's claims on their merits and decide the constitutional issues that clearly exist should petitioner prove its allegations. The issue now before this Court is not whether petitioner's claims are true but whether, taking those claims as true, petitioner states a case arising under the Constitution of the United States and has standing to vindicate its claims in United States courts.

The foreign parent corporation of a domestic subsidiary should have standing to sue in the United States courts for injuries to its commerce caused by California's unitary tax scheme for the following reasons:

1. A foreign corporation that does not do business in the United States is denied entry to the courts of California to adjudicate its claims of injury to foreign commerce caused by California's tax scheme.

2. A foreign corporation's claim that, on its face, demonstrates injury to itself and to foreign commerce as a result of State action, presents a case arising under the Constitution of the United States that can be heard in United States courts.

3. Petitioner's claim, on its face, demonstrates burdens on itself and on the foreign commerce of the United States. The intervention of a foreign government in the case as *amicus* reinforces petitioner's claims of injury to the foreign relations of the United States.

4. This Court have already held that the State of California has no authority to impose burdens on the instrumentalities of the foreign commerce of the United States or to interfere with the Federal Government's "one voice" in foreign affairs. Petitioner should be permitted to offer its case to show violation by the State of this Court's prior decisions and the Constitution.

Petitioner's claims clearly state a case or controversy arising under the Constitution; petitioner, a foreign corporation, has no other plain, speedy and efficient remedy to adjudicate its claims; the case is ripe for adjudication since the tax has already been assessed by California and paid by petitioner's subsidiary; the conclusion is inescapable, therefore, that petitioner or any other foreign corporation similarly situated should have standing to sue for redress in the courts of the United States.

ARGUMENT

PETITIONER, A FOREIGN CORPORATION THAT DOES NOT DO BUSINESS IN THE UNITED STATES, ALLEGES AN INDEPENDENT INJURY TO ITSELF AND TO UNITED STATES FOREIGN COMMERCE BY REASON OF CALIFORNIA'S UNITARY TAX SCHEME. THIS STATES A CASE ARISING UNDER THE CONSTITUTION AND SHOULD CONFER STANDING TO SUE IN UNITED STATES COURTS.

A. Petitioner And Others Similarly Situated Suffer Independent Injuries To Themselves Under California's Unitary Tax Scheme.

Petitioner alleges an injury that, for the purposes of this petition, must be taken as demonstrated. The court below, nevertheless, dismissed petitioner's claims on the grounds that petitioner's injury was that of a shareholder and purely derivative. In the words of the Court of Appeals, "EMI's only possible injury is the diminution in

value of its holding in Capitol." Petitioner's Appendix A-6. If this view stands, there is no forum in which a claim of injury to foreign commerce can be adjudicated. A U.S. subsidiary assessed with a tax based on its foreign parent's foreign source income cannot allege a violation of the Foreign Commerce Clause in either State or Federal courts since the subsidiary is not in foreign commerce and, therefore, clearly has no standing to complain of a foreign commerce injury. If the foreign parent also has no standing, then the Foreign Commerce Clause is *terra infirma* for private parties. Petitioner does, indeed, allege a direct injury based not solely on its position as a shareholder and should be permitted to offer evidence to prove that allegation.

Petitioner has alleged that it is directly burdened by California's unitary method of taxation. Central to those burdens is the requirement that Petitioner supply detailed financial information concerning its worldwide operations. In *Alcan Aluminium* v. *Department of Rev. of State of Or.*, 724 F.2d 1294 (7th Cir. 1984), the court recognized the foreign parent's "independent injury" as a basis for standing. Key among those injuries is the obligation to supply detailed financial information. *Id.* at 1296. Petitioner (EMI) here has made the same allegation: that *it* is forced to produce detailed financial information concerning its worldwide activities.

States utilizing unitary taxation engage in the ploy of directing requests for information to the domestic subsidiary. Those requests, however, involve detailed inquiries with respect to the operations of the foreign parent and its foreign subsidiaries. Subsidiaries do not in the normal course collect detailed financial information on their parents and their parents' foreign holdings. Subsidiaries simply cannot respond to such demands and, if

the requests are to be honored, they are a burden which falls squarely on the foreign parent.

More often than not, even the foreign parent cannot honor the requests because the requests presume that the rest of the world operates according to the State's tax accounting principles. This presumption is palpably untrue. Were unitary tax apportionment to be universally adopted, it would also require uniform standards of tax accounting be adopted. If the latter is not done, multinationals would be required to maintain as many separate and parallel accounting systems for *each unitary nation* in which they operate as there are unitary nations *in total*. No company could afford such accounting systems.

The Seventh Circuit Court of Appeals, in a factually similar case, *Alcan Aluminium, supra.*, reached the opposite conclusion from the court below (Ninth Circuit) on the issue of standing of the foreign parent. In the words of the [Seventh Circuit] Court of Appeals:

> Appellant [Alcan] has alleged an independent injury as basis for standing. It claims an unconstitutional burden on its foreign commerce. If appellant's allegations are accepted as true, its interests and those of . . . [Alcan's U.S. subsidiary] are not identical [citation omitted]. Thus . . . [the U.S. subsidiary's] state remedy does not protect appellant fully. As soon as the tax is assessed against . . . [the U.S. subsidiary] the threat of injury to appellant will be immediate.
>
> [724 F.2d at 1299]

The court's ultimate dismissal of the case was based, not on lack of standing, but on ripeness—Oregon refused to issue a final assessment of the tax while the case was pending. The tax will, apparently, never be assessed since Oregon has now repealed its unitary tax statute. There is no issue of ripeness in the instant (EMI) case.

Petitioner should, therefore, have standing to sue in United States courts under the standard announced by the Seventh Circuit Court of Appeals.

It is not an answer to say that the imposition of a tax on a domestic subsidiary of a foreign parent is a matter affecting only the subsidiary directly. Under California law, the worldwide combined unitary group is defined as "the taxpayer," but only the domestic unit of that group is allowed access to the State's courts, and then only as to matters affecting the computation of the tax. CALIFORNIA REV. & TAX CODE, § 25101 provides:

> When the income of a taxpayer subject to the tax imposed under this part is derived from or attributable to sources both within and without the state, the tax shall be measured by the net income derived from or attributable to sources within the state in accordance with the provision of Article 2 . . . [the three factor apportionment provisions].

As applied by California, this provision includes the foreign parent since its income becomes the base upon which the worldwide combined income tax is apportioned. For purposes of legal action, however, the "taxpayer" is apparently limited to the entity that actually pays the tax, i.e., the domestic subsidiary. The parent cannot "pay" the tax since it neither does business nor files tax returns in California. There is, therefore, no forum provided by California in which petitioner or any other foreign parent can raise the claims petitioner seeks to adjudicate in Federal court. *Capitol Industries-EMI, Inc.* v. *Bennett*, 681 F.2d 1107, 1118-1119 (9th Cir. 1982), *cert. denied*, 459 U.S. 1087, (1982); *cf.*, Petitioner's App. A-4 (9th Cir. Opinion). The State courts are not, in any event, appropriate fora in which a claim of injury to the foreign commerce of the United States or a violation of the Foreign Commerce Clause should be adjudged. In the State court

opinion reversed by this Court in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), the philosophy expressed by the California Supreme Court made it clear why a state court should not be allowed to decide a Foreign Commerce Clause case:

> [T]he threat of double taxation from foreign taxing authorities has no role in commerce clause considerations of multiple burdens, since burdens in international commerce are not attributable to discrimination by the taxing state and are matters for international agreement.
>
> [441 U.S. at 439, quoting Cal. Sup. Court]

B. Petitioner's Claims State A Case Or Controversy Arising Under The United States Constitution That Should Confer Standing To Sue In United States Courts.

In *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159, 77 L.Ed.2d 545 (1983), this Court expressly declined (n.26) to address the question whether California's unitary income tax scheme, when applied to a foreign parent corporation of a domestic subsidiary, violated the Foreign Commerce Clause of the Constitution. This Court went further (n.32) and recognized that there might be more foreign policy significance to the incidence of a tax that falls on a foreign interest than one that falls on a domestic interest. The petitioner now presents the exact question left open by this Court in *Container*. This case, based on the allegations of petitioner, properly falls within the rubric of *Japan Line, supra*. The two principal distinctions that indicated a result in *Container* (enumerated by this Court, 77 L.Ed 2d at 567-568) opposite from *Japan Line*, do *not* exist in this (EMI's) case:

1. The division of the tax base "pie" between formulary apportionment and "arm's length" allocation may result in a fairly apportioned or even a lower tax in the case

of a domestic parent, *e.g.*, *Chicago Bridge & Iron Co.* v. *Caterpillar Tractor Co., Illinois Dept. of Rev. et al.*, ___ U.S. ___, No. 81-349 (1983, dismissed) depending upon the facts of the case. Thus, double taxation may not actually occur. In the case of a foreign parent with substantial foreign (to the U.S.) source income and a domestic (U.S.) subsidiary with relatively smaller U.S. source income, California's formulary apportionment will generally increase greatly the amount of California's assessment for which no relief at all can be obtained in the foreign parent's domiciliary jurisdiction or any other foreign jurisdiction.[2]

2. The incidence of California's tax based on petitioner's foreign source income falls, contrary to the facts in *Container*, on the foreign owners of an instrumentality of foreign commerce. For example, a foreign parent corporation with income twelve times greater than its domestic (U.S.) subsidiary (a ratio achieved or exceeded by several OFTII members) may have a California formulary income *tax* assessed against the domestic subsidiary that exceeds the taxable *income* of the subsidiary. Any contribution toward payment of the California tax by the foreign parent would be a nondeductible capital contribution to the domestic subsidiary. Hence, the income tax that is levied by California on income that is also taxed by the foreign domiciliary jurisdiction cannot even be apportioned ratably among the multinational group members by a tax-sharing agreement such as is commonly

---

[2] Several OFTII members have experienced decreases in apportioned taxes due to inclusion of foreign parents' losses in the tax base. They, nevertheless, oppose the unitary method because the compliance burden is out of all proportion to any possible benefit and because a decrease is an aberrant in the normal result.

used by domestic corporate groups filing consolidated returns. Double taxation is almost inevitable.

There are other factors present in California's unitary income taxation scheme that clearly demonstrate the burden on foreign commerce when the scheme is applied to include a foreign parent corporation. These are:

(a) In order to compute the correct apportionment of California tax, the foreign parent must conform its accounting practices to California tax accounting principles. This may be very difficult to accomplish and, given the wide divergence in accounting principles between foreign countries and the U.S., very expensive as well.

(b) The necessity to convert foreign currency transactions to U.S. dollars for California tax purposes is an additional and direct burden on a foreign parent. A domestic corporation with foreign subsidiaries must calculate currency conversions to U.S. dollars for many purposes, including financial disclosure and State and Federal tax returns. A foreign based multinational must calculate currency conversions for its domiciliary jurisdiction and, under California's rules, also prepare conversions to U.S. dollars. This is a direct and burdensome chore imposed by California on the foreign parent.

(c) The "more searching inquiry" addressed to tax apportionment in foreign commerce by *Container* (77 L.Ed.2d at 555) mandates an opposite result from *Container* in the case of a foreign parent. The theory of California's unitary taxation scheme upheld by *Container* is that services, know-how, and guidance are provided by a parent to its subsidiaries. *Cf.*, *Chicago Bridge & Iron Co.*, *supra*. These services, it was found by the California courts, create income that would escape taxation domestically, except, perhaps indirectly, through inclusion of foreign source dividends in the domestic tax

base. *Cf.*, *Mobil Oil Corp.* v. *Commissioner*, 445 U.S. 425 (1980). This principle cannot, on its face, apply to a foreign parent of a domestic subsidiary. Any benefit the subsidiary dervies from management expertise and services provided by a foreign parent *increases* domestic income subject to tax. The jurisdiction that may suffer loss of tax revenue under such circumstances is the foreign jurisdiction in which the *parent* providing services is domiciled. Prevention of shifting of income, deductions and credits among members of a controlled group is, to be sure, the function of INTERNAL REVENUE CODE, § 482 embodying the "arm's length" trading standard adopted by the United States and virtually every one of its international trading partners. The "arm's length" standard is, of course, rejected by California's "unitary" tax scheme.

The application of unitary apportionment "upstream" (from subsidiary to foreign parent) violates the basic principles upon which the unitary income tax scheme rests, namely, "downstream" apportionment to include in the tax base foreign source income produced as the result of domestic expenditures and activities. "Downstream" apportionment, *i.e.*, including the subsidiaries of a parent corporation that controls and directs the activities of those subsidiaries, has a much less chilling effect on foreign commerce and foreign relations where the parent is domiciled or does business in the taxing jurisdiction. A downstream apportionment theory is applied by INTERNAL REVENUE CODE, § 861 and the regulations thereunder, but limited to United States domiciliary parents of foreign corporations. The power of the States to apply a somewhat similar "downstream" apportionment for *domestic parent* taxpayers was upheld in *Container*. The basic premise of that application is missing entirely in the case of the *foreign parent* of a *domestic* subsidiary. "Up-

stream" apportionment, *i.e.*, including foreign income of a foreign parent based on the domestic subsidiary's activities, not only rests on questionable economic principles, but has a direct and chilling effect on foreign commerce and the foreign relations of the United States. This is made clear in the *amicus* brief filed by Her Britannic Majesty's Government in support of the petitioner in this case. The difficulties of trying to negotiate a tax treaty with the United States where the Federal Government does *not* speak for the States are amply illustrated by the history of the 1975 U.S.-U.K. Tax Convention and the current suspension of negotiations with the German Federal Republic (West) and the Netherlands.

C. This Court Already Held That State Taxation Of Instrumentalities Of Foreign Commerce Creates Impermissible Burdens And Interferes With Federal Constitutional Powers. Those Decisions At Least Confer Standing Upon Petitioner To Sue In United States Courts To Vindicate Its Constitutional Claims.

Petitioner, a foreign corporation that does not do business in the United States, alleges that inclusion of *its* (wholly foreign source) income in California's pre-apportionment tax base has resulted in an unconstitutional burden on foreign commerce. *Japan Line, supra.*, stands as this Court's most recent statement of constitutional standards by which burdens on foreign commerce are to be measured. Although this Court reached the issue of the burden on foreign commerce in their recent decision in *Container, supra.*, it is clear that they limited application of *Container* to the situation of a *domestic* parent:

> We have no need to address in this opinion the constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries.
>
> [*Id.* at 568, n. 26]

This Court further pointed out the analogy articulated in *Japan Line:*

> We specifically left open in Japan Line the application of that case to "domestically owned instrumentalities engaged in foreign commerce," . . . [citation omitted] and—to the extent that corporations can be analogized to cargo containers in the first place—this case falls clearly within that reservation.
>
> [*Id.* at 568]

By means of the same analogy, it is clear that a foreign parent is the equivalent of foreign "owned instrumentalities engaged in foreign commerce" and falls squarely within the doctrine articulated in *Japan Line, supra.*

D. Proof Of Impermissible Burden On Foreign Commerce Forbidden In *Japan Line* Is Most Appropriately Presented By Foreign Parents.

In *Japan Line* this Court encountered a similar method of local taxation and held that it placed impermissible burdens on foreign commerce. *Japan Line* involved an action by six Japanese shipping companies incorporated under the laws of Japan and that had their principal places of business and commercial domiciles in that country. Plaintiffs in *Japan Line* challenged the constitutionality of the imposition of California's *ad valorem* property tax to shipping containers owned by the plaintiffs, used exclusively for transportation of cargo in foreign commerce, and subject to property tax in Japan. California imposed the *ad valorem* property tax on plaintiffs' containers which "passed through" the State during the course of their international journeys.

In *Japan Line,* this Court found that California's *ad valorem* property tax, as applied to the foreign plaintiffs'

shipping containers, which were temporarily located in California, but which were also based, registered and subjected to property tax in Japan, was unconstitutional because it resulted in multiple taxation of the instrumentalities of foreign commerce. This Court noted that when a State seeks to tax foreign instrumentalities, the principles of the Foreign Commerce Clause bring two distinct considerations into play. The first is the enhanced risk of multiple taxation. This Court observed:

> Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though "fairly apportioned" to reflect an instrumentality's presence within the State may subject " 'foreign commerce to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids.' "
>
> [*Id.* at 447-448]

The second consideration identified by this Court is the fact that "a state tax on instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." *Id.* at 448. This Court unequivocally declared that "foreign commerce is preeminently a matter of national concern." *Ibid.* This Court identified two critical ways in which a State tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity:

> [1] If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise.
>
> [2] If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be

> directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from "speaking with one voice" in regulating foreign commerce.
>
> [*Id.* at 450-451]

It is these principles, identified by this Court in *Japan Line*, that directly control petitioner's cause.

Domestic subsidiaries are not equipped to present to a court the type of evidence necessary to demonstrate whether double taxation has been avoided and federal uniformity achieved, as required by *Japan Line:*

1. ***Double Taxation.***

In the context of a foreign parent-domestic subsidiary combination, the risk of double taxation occurs when the income of the foreign parent or one of its foreign subsidiaries is included in the unitary tax base. If this income has been taxed as though wholly attributable to the host country of the foreign parent or its foreign subsidiary, then the use of it again to assess California's tax results not simply in the *risk* of double taxation, but in double taxation in fact.

It is clearly the foreign parent, not its domestic subsidiary, that sees and pays this double tax. It is the foreign parent that has the knowledge of how it and its foreign subsidiaries are taxed by their host countries. It is the foreign parent whose income is reduced by multiple taxes on the same income. To suggest that a domestic subsidiary does or should have information concerning

these double taxes simply ignores the reality of corporate organization.

2. ***Federal Uniformity.***

It is quite unreasonable to require a domestic subsidiary to become involved directly in international disputes over reconciliation of apportionment. It is the foreign parent that must negotiate competing claims to tax income from its worldwide operations, and it will be the foreign parent, *not* the domestic subsidiary, that controls the worldwide investment decisions based on different taxing schemes. It is also the foreign parents that monitor the world's financial and tax structures in order to make sound investment decisions. Many members of OFTII do not do business outside the United States at all and, therefore, are totally indifferent in their normal course of operations to any asymmetry in the international tax structure which could result in retaliation. To assert it must be the domestic subsidiary that bears the burden of proof in a foreign commerce case ignores the realities of both the burden and of normal corporate organization.

CONCLUSION

For the reasons stated, the petition should be granted and the case remanded to be heard on the merits of

petitioner's claims of injury under the Foreign Commerce Clause.

Respectfully submitted,

JAMES M. CARTER
(Counsel of Record)
ICI AMERICAS INC.
Wilmington, DE 19897
(302) 575-3738

LAWRENCE A. SALIBRA
ALCAN ALUMINUM CORP.
100 Erieview Plaza
P.O. Box 6977
Cleveland, OH 44101
Counsel for Amicus Curiae

November 20, 1984

APPENDIX

APPENDIX 1

The Organization for Fair Taxation of International Investments, Inc. ("OFTII"), a Delaware nonprofit corporation, includes the following corporations organized and doing business in the United States:

Alcan Aluminum Corporation
Allied-Lyons North America Corp.
BASF America Corp.
BATUS, Inc.
Beecham, Inc.
The BOC Group
Elf Aquitaine, Inc.
Foseco Minsep
Gold Fields American Corp.
Harrison & Crosfield (America) Inc.
ICI Americas Inc.
INCO United States, Inc.
Lever Brothers Company
Moet-Hennessy U.S. Corp.
Nestle Enterprises, Inc.
Shell Oil Company
Siemens Capital Corporation
Silor Optical, Inc.
Sony Corporation of America
Thorn EMI (USA) Inc.
Volkswagen of America, Inc.
Whatman, Inc.
and others